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In the

UNITED STATES SUPREME COURT

OCTOBER TERM, 1940

H. C. JORDAN AND ROSS WALKER, *Petitioners*

VERSUS

G. V. FISHER, FRANCES AMBROSE LAW AND HUSBAND, HAROLD WARD LAW, AND HONOLULU OIL CORPORATION, *Respondents*

AND

H. C. JORDAN AND ROSS WALKER, *Petitioners*

VERSUS

G. V. FISHER AND HONOLULU OIL CORPORATION, *Respondents*

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Fifth Circuit

To the Honorable, the Chief Justice and the Associate Justices of Supreme Court of the United States:

H. C. Jordan and Ross Walker, resident citizens of the State of Texas, respectfully present this their Petition for Writ of Certiorari to the Circuit Court of Ap-

peals of the United States for the Fifth Circuit to review a final judgment of said Circuit Court entered on December 18, 1940, where it reversed a judgment of the District Court of the United States for the Northern District of Texas, Lubbock Division, and represent:

PRELIMINARY STATEMENT

The Record accompanying this application covers two suits consolidated into one between the same parties to establish title to two adjoining tracts of land in Yoakum County, Texas, begun by Respondents in the District Court of the United States for the Northern District of Texas, Lubbock Division, against Petitioners, one suit No. 63 Civil Action for 120 acres, (R. 3-9) and the other No. 64 Civil Action for 200 acres, (R. 43-49. Jurisdiction of the District Court in each case was based on diversity of citizenship, the Respondent Plaintiffs being citizens of California, and Petitioners being citizens of the State of Texas, the value of each tract of land in excess of $3,000.00, and each tract situated within such District and Division of said Court, (Id.). The District Court consolidated and tried them together but entered a separate judgment in each case and rendered one opinion covering both cases, (R. 19). Only one Record on appeal was made, same covered both cases under one cover, and the Circuit Court of Appeals, by its order, consolidated and heard them as one case and rendered one opinion covering said consolidated cases.

Petitioners claimed title to an undivided one half interest in each tract, filed answer and cross action so asserting, and judgment was rendered for them after a hearing and trial with jury waived for an undivided one half interest in each tract and for Respondents for the other undivided one half interest, (R. 39; 63). The Court filed Findings of Fact and Conclusions of Law, (R. 35; 58), rendered an opinion, (R. 19) and Respondents appealed, (R. 41-42; 63). On appeal the cases were reversed by the United States Circuit Court of Appeals for the Fifth Circuit on December 18, 1940 on written opinion, holding superior title in Respondents against Petitioners for the whole of each tract of land, (R. 324-332). Said decision practically disposes of the case in favor of Respondents. Petitioners, therefore, present this Petition for Writ of Certiorari.

BRIEF STATEMENT OF THE CASE

Petitioner H. C. Jordan acquired Section 800 of 640 acres from the State in 1908, (R. 68). It was community property of him and his wife, Ethel Hall Jordan, (R. 69). The two tracts in suit is the East Half of the Section; the 200 acres was their homestead, (R. 146; 148). They separated about October 7, 1912, Jordan leaving the State at once and going to California and and remaining there until 1921. He enlisted in the Army in 1917 for the World War as a resident citizen of the State of California, (R. 244-245).

BASIS OF SUPREME COURT'S DECISION

The 120-acres—The Attachment Judgment:

On November 14, 1912, after Jordan had left the State, one W. E. Head sued him in the County Court of Scurry County, Texas, on a debt of $337.50 and attached the 440 acres of Section 800 (all of it except the 200 acre homestead). Service of citation was by publication, (R. 36).

Default judgment was rendered for the debt on July 10, 1913, and the 440 acres (the 120 acres a part) was ordered sold at Sheriff's sale. It was sold to R. H. Looney on November 4, 1913, who satisfied the judgment and costs for the land, (R. 76-77).

By mesne conveyance Looney conveyed the 440 acres to William Hall, father of Jordan's wife, (R. 83-94). Later said Hall and his Estate conveyed the 120 acres to Ethel Hall, the then divorced wife of Jordan, (R. 109-111). (She was divorced from Petitioner Jordan on September 19, 1916, R. 148). Ethel Hall thereafter conveyed the 120 acres to Respondent, G. V. Fisher, who then executed an oil and gas lease to Honolulu Oil Corporation and by mesne conveyances conveyed an undivided one-half interest to Frances Ambrose Law and husband, Co-Respondents herein, (R. 118; 131-143).

Service in the case was by citation by publication based on this affidavit of Head's attorney:

> "That he has made diligent inquiry concerning the whereabouts of the defendant, H. C. Jordan, in

> the cause of W. E. Head vs. H. C. Jordan, No. 513, in the County Court of Scurry County, Texas, and that the whereabouts of said defendant by the use of reasonable diligence cannot be ascertained; that said affiant is one of the attorneys for the plaintiff in said cause, and asks for citation by publication."

Article 2039 authorized a citation by publication:

> "where a party * * * shall make oath * * * that any party defendant therein is a non-resident of the state, or that he is absent from the state, or that his residence is unknown to affiant, the clerk shall issue citation for such defendant * * *".

Respondents alleged that the judgment and sale was valid and divested title out of Jordan to the 120 acres, (R. 67). Petitioners answered, denying the validity of the judgment and sale and by cross action claimed Jordan's undivided one-half interest, as co-tenants with his divorced wife and her assigns, (Respondents) alleging that the citation by publication was not legally authorized by Statute so that the County Court never acquired jurisdiction to render the judgment and sell the lands, (R. 10-12); also that the court had no jurisdiction to sell the lands without first acquiring jurisdiction over him to adjudicate the judgment and sale, it being a prerequisite for the court to acquire jurisdiction over Jordan by serving him in the mode prescribed by Statute, (Id.) Respondents replied they were innocent purchasers for value without notice and Petitioners answered that the record in the cause

showed the infirmity of the judgment and the sale; that Respondents were required by law to inquire if the Court had jurisdiction to render the judgment against Jordan and next to inquire if it had jurisdiction to sell the lands, (Id.)

The District Court sustained Petitioner's contentions holding that under the Statutes of Texas and the decisions thereunder by our Supreme Court, the citation by publication against Jordan was issued on a ground not authorized by law, nor meeting the requirements of the Statute, and was a nullity; finding that the affidavit for the citation was the only one filed and that the citation published was based thereon, (R. 30). The applicable Statute and the decisions so holding were cited in the opinion, (R. 19-30). The court also found that the record in the County Court case disclosed the infirmity of the proceedings for the court's jurisdiction to attach to adjudicate and held, by reason of the nullity of the judgment and sale, that an inquiry would thus disclose the invalidity of the proceedings, that the County Court never acquired jurisdiction to adjudicate against Jordan and his property, also Respondents could not claim Jordan's one-half interest in the land as innocent purchasers for value without notice under the established law in Texas, (R. 38; 19-30).

On appeal the Circuit Court of Appeals reversed the holdings of the District Court holding:

(1) That under the facts stated, the County Court judgment was merely voidable, not void, and so could not be collaterally attacked.

(2) That the sale of the land in question was valid as against a collateral attack, (R. 324-329).

The court cited no Texas Statute nor Texas decision to sustain its holding, (Id.). It based its holding on the ground that the use of the word "whereabouts", under a liberal construction of Article 2039 quoted, was the equivalent of "residence" and also on the ground that the clerk inserted in the citation that Jordan's residence was unknown and the judge recited in the judgment that he was "duly cited" and the Circuit Court said: "It thus appears that the clerk thought and the judge decided that 'whereabouts' was the equivalent of 'residence', (R. 327).

The Court admitted that a Texas Court of Civil Appeals (Young vs. Young, 127 S. W. 898) had directly held that in a service by publication "whereabouts" is not the equivalent of "residence".

The Circuit Court of Appeals admitted that the Supreme Court of Texas directly holds that a sale of attached lands without a valid service in the mode prescribed by law on the defendant is a nullity, for the reason the Statutory requirement is jurisdictional.[1]

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1. "Article 2050. No judgment without service. In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance by the defendant, as prescribed in this chapter, except where otherwise expressly provided by law."

(Stewart vs. Anderson, 8 S. W. 295; American Surety Company vs. S. L & S. Co., 180 S. W. 101, Sup.)

In other words, it is the Statute of Texas, as construed by the Supreme Court, that jurisdiction of a court to sell attached lands is denied until a judgment has been entered against the defendant, based on a valid citation issued and published as required by Statute.

It is, therefore, believed by the Petitioners that the judgment and opinion of the Circuit Court is in conflict with the Statutes of Texas and with the decisions of the Texas Courts, Supreme and Courts of Civil Appeal, on the validity of the County Court judgment attacked, as well as the sale of the attached lands to satisfy it, and that it is without support of any Texas Statute or decision of the Texas Court; that the laws of Texas and the decisions applicable should rule the case at bar and were not applicable by the Circuit Court in its decision.

The case before the Court presented a controversy of title to land situate in Texas wherein a County Court judgment and sale by a Texas Court was attacked. Therefore, the Supreme Court has jurisdiction to review the Circuit Court's judgment reversing that of the District Court and this under Section 347 U.S.C.A. and rule 38 of the Supreme Court.

Also the Circuit Court's opinion and decision in this case is in conflict with the case of Johnson vs. Hunter,

147 Federal 133 by the 8th Circuit Court of Appeals on the same matter or question. In said case a State Court of Arkansas had rendered a judgment against Johnson subjecting his land to levee liens on a judgment against him based on a citation by publication, alleging that he was a non-resident but did not allege that he was not in the County at the time of the suit or that there was no one on the land occupying it at said time. The Statute in question authorized service by publication upon non-residents of the state and further "provided further, actual service of summons shall be had where the defendant is in the county or where there is an occupant of the land." Johnson was a resident of Ohio at the time of the suit and judgment and sale of his land. By reason of the defects or omission in the affidavit or the citation, the Circuit Court of Appeals held that the State judgment was a nullity under the Arkansas Statutes and the decisions of the Arkansas courts and that the defect in said citation was jurisdictional so that the judgment and the sale was void and not merely voidable.

Petitioners therefore present these questions that are material, which will determine the rights of the parties hereto:

1. Under the allegations in the Head affidavit quoted, was the County Clerk of Scurry County, Texas, authorized, under Article 2039, to issue and have published the citation against Jordan, a non-resident?

2. Under the facts stated, ~~was~~ did the issuance of the citation by the clerk, with the recitations in the citation that Jordan's residence was unknown, and the publication thereof, constitute legal notice to him to appear and defend the Head suit?

3. Under the facts stated, assuming that the citation for publication issued by the clerk was not authorized by Article 2039 and that the citation published against Jordan did not constitute legal notice served upon him to defend the suit, was the County Court of Scurry County, Texas, authorized to sell Jordan's lands and divest title thereto to satisfy the debt demand of W. E. Head—it being conceded by the Circuit Court of Appeals in this case that the Supreme Court of Texas holds that a sale of attached lands is a nullity if the defendant owner has not been served with legal notice in the mode prescribed by Texas Statutes, (Stewart vs. Anderson, 8 S. W. 295; American Surety Company vs. S. L. & L. Co., 180 S. W. 101)?

BASIS OF THE SUPREME COURT'S JURISDICTION AS TO THE 200 ACRES.

The 200 acres was the community property and the homestead of Jordan and his wife prior to September 19, 1916, when the wife divorced Petitioner Jordan. She began a suit against him in the District Court of Scurry County, Texas, on December 31, 1915, in said Court, alleging his residence was not known and prayed for citation by publication against him;

alleging in her petition that his abandonment was a ground for divorce and she also asked her maiden name to be restored and her children's name changed to her maiden name, (R. 183). She also alleged that the 200 acres in question, with a vacant lot in Plains, Texas, was their community property but because of his abandonment of her title should be divested out of him thereto and vested in her, (Id.). She had default judgment against him thereafter on September 19, 1916, for divorce, change of name and a judgment divesting the title to the land in her. No attorney was appointed to represent Jordan in said suit and no appearance or waiver was made by him, (R. 148). No statement of the evidence introduced, if any, to support the judgment was caused to be transcribed and filed in the cause, (R. 329; 175)

The judgment so entered was recorded on March 5, 1920, in Volume 12, page 203 of the Deed Records of Yoakum County, Texas, where the land was situated, (R. 148). The pleadings in said cause, nor the judgment, as respects the lands, was not for a partition or division thereof between the parties but was to divest title out of Jordan and vest it in the wife, which the judgment purported to do, (R. 148; 183) contrary to Article 4638.[1]

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1. "Article 4638. Division of Property. The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate."

Thereafter, on November 19, 1927, the divorced wife, Ethel Hall, filed a Trespass to Try Title suit against Jordan in the District Court of Yoakum County, Texas, alleging his residence unknown and for him to be cited by publication, (R. 191; 193) and thereafter had another default judgment against him on June 5th, 1928, (R. 146). The judgment simply recites that title is divested out of Jordan and vested in Ethel Hall. She then conveyed the 200 acres to G. V. Fisher, in satisfaction of a mortgage, on February 26, 1931, (R. 153-155). Fisher then executed an oil and gas lease to the Honolulu Oil Corporation, (R. 159-165).

In the First Count of her petition in said suit she alleged she owned the 200 acres and that Jordan dispossessed her. She stated no fact showing her title superior to Jordan's, (R. 191). Article 1977[2] of the Statute required, for a cause of action, the plaintiff to allege her title and facts to show it was superior to Jordan's title.

The Second Count of her petition was to establish title by the Statute of Limitation for 10 years with her memorandum of title recorded for such period, (R. 192). She alleged her memorandum of title was the divorce judgment which was recorded on March 5,

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2. "Article 1977. Requisites of pleadings. The pleadings in such case shall set forth the title of the complainant, and such proceedings shall be had in such action as may be necessary to fully settle and determine the question of right or title in and to said property between the parties to said suit, and to decree the title or right of the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment or order into effect."

1920, and she based her right to recover by reason of the aforesaid judgment, (Id.). She alleged adverse possession by reason of such divorce judgment, (Id.).

As aforesaid, as respects this 200 acres, Respondents sued Petitioners in the District Court of the United States for the Northern District of Texas, Lubbock Division, on October 27, 1939, and alleged that the divorce judgment of September 19, 1916 divested title out of Jordan and vested it in his wife, Ethel Hall, (R. 46). Also, they alleged the 1928 judgment of June 5, 1928, in favor of Ethel Hall against said Jordan in the District Court of Yoakum County, Texas, divested title out of him and vested it in said Ethel Hall, (R. 46-47). Petitioners answered denying the validity of the judgments and by cross-action alleged the nullity of said judgments, that Jordan owned in community with his wife a one-half interest in the 200 acres until she divorced him on September 19, 1916, and that since that time he has owned an undivided one-half interest as a co-tenant with Ethel Hall and her assigns, Respondents herein, (R. 50-55). It was alleged that the divorce judgment divesting title was a nullity for the reason the jurisdiction of the court to do so was denied by Article 4638, (Id.). As to the 1928 judgment they alleged its nullity for the reason no cause of action or subject matter was presented to the court for it to exercise jurisdiction to decree as to the first count and as to the second count that Article 5510 forbid a cause of action to establish a 10 year Limitation Title with-

out such title being of record in the Deed Records of Yoakum County, Texas, where the land was situate, for ten or more years. Further that such claim of title asserted in said judgment by Ethel Hall was based on the 1916 divorce judgment, which was a nullity, and that the court had no jurisdiction to confirm a void judgment which was the purpose of the second count of her petition, (Id.).

On a hearing after trial of this case the District Court entered judgment for Petitioners for a one-half interest in the 200 acres, holding the two aforesaid judgments were void and, being void, that Respondents could not claim Jordan's one-half interest in said land as innocent purchasers for value and without notice, (R. 31-35). The court filed Findings of Fact and Conclusions of Law, (R. 31-38) as sustaining his decision and judgment.

On Respondents' appeal the Circuit Court of Appeals reversed the holdings of the District Court and held that the divorce judgment divesting Jordan of the land was valid against a collateral attack; further holding in this connection that Article 4638 was not a limitation on the jurisdiction of the District Court of Scurry County in the divorce judgment but that said article "was intended to guide the court by prescribing a rule of decision", (R. 330).

As to the 1928 judgment it held that it was not void but merely voidable and not susceptible to a collateral attack on the theory that two separate tracts of land

constituted the 200 acres and neither of such tracts exceeded 160 acres, so that Article 5510 did not forbid judgment establishing a 10 Year Limitation Title, where the memorandum of title as the basis therefor was not duly registered in the Deed Records of Yoakum County, Texas, where the land was situate.

It was the contention of Petitioners that Article 4638 denied jurisdiction of the District Court to divest Jordan's title to the 200 acres and that Article 5510[1] forbid a cause of action for a court to adjudicate when the cause of action pleaded stated facts showing that no cause of action for a limitation title could exist under Article 5510 as construed by the Supreme Court of Texas (Baker vs. Temple Lumber Co., 12 S. W. (2) 175; Temple Lumber Co. vs. Pulliam, 285 S. W. 609; Vergara vs. March, 239 S. W. 544; Baker vs. Fogle, 217 S. W. 141; and McCament vs. McCament, 187 S. W. 1096).

It was also contended that the limitation title pleaded was the divorce judgment, which was void, and that her said suit was for the purpose of having the court con-

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1. "Article 5510. Ten years' possession. Any person who has the right of action for the recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. The peaceable and adverse possession contemplated in this article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be coextensive with the boundaries specified in such instrument."

firm the validity of said divorce judgment which was void, so that the court had no jurisdiction of a cause of action to confirm a void judgment. It was further contended that the divorce judgment could have no effect other than to decree to Ethel Hall the use of the 200 acres as against Jordan for a term of years, or for life, so that there could be no cause of action by the wife against him for title based on adverse possession without a repudiation of the divorce judgment on her part, (R. 52-55).

Petitioners therefore present these questions respecting the two judgments against Jordan affecting the 200 acres:

1. The divorce judgment: Did the terms and provisions of Article 4638, as applied to the record facts in the divorce judgment as herein related, prescribe a limitation on the jurisdiction of the court to divest title out of Jordan rather than a "Rule of Decision"?

2. In the determination of the validity of the divorce judgment under the facts stated, should the Circuit Court of Appeals have adopted and applied the provisions of Article 4638 as construed by the Supreme Court of Texas and the Courts of Civil Appeals of the State?

3. The 1928 judgment: Under the facts stated, that is Ethel Hall's allegations to establish in her a 10 year limitation title out of Jordan under Article 5510, and which allegations and references therein

showed her alleged memorandum of title recorded in the Deed Records of Yoakum County, Texas, for about seven and one-half years and not duly registered for ten years, did said cause of action thus presented to the court present a cause of action inhibiting recovery upon the facts she alleged?

4. Under the facts stated, assuming that the divorce judgment of 1916 did not have effect to divest Jordan of title to his interest in the 200 acres, did the allegations for a 10 year limitation title out of Jordan present a subject matter or cause of action for the court's determination, it appearing from her allegations that she affirmed the 1916 judgment and did not repudiate it?

5. Under the facts stated and in particular the allegations in Ethel Hall's petition for a title to be vested in her and divested out of Jordan by reason of her divorce judgment against him, assuming that the divorce judgment did not have effect to divest title out of Jordan and vest it in the wife, did the cause of action so presented to the District Court of Yoakum County, Texas, present a case for the court to confirm as valid the divorce judgment?

All the foregoing questions were duly presented by Petitioners to the trial court and also in their briefs in the Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The attachment judgment: The Honorable Circuit Court of Appeals for the 5th Circuit, in reversing the judgment below and in holding that the judgment attacked was not void, that the County Court of Scurry County, Texas, acquired jurisdiction to render it, wholly disregarded Articles 2039 and 2050 of the Texas Statutes and the applicable Texas decisions of Young vs. Young, 127 S. W. 898; Stegal vs. Huff, 54 Texas 193; Stoneman vs. Bilby, 96 S. W. 50 (writ refused); Borden vs. City of Houston, 62 S. W. 426; Dunn vs. Taylor, 94 S. W. 347 and others, which hold that a clerk is not authorized to issue and have published a citation against a non-resident defendant on an affidavit by the plaintiff or his attorney that does not allege that he is a non-resident or that his residence is unknown. Specifically, the Texas courts, in this connection directly hold that the affidavit in question and quoted at page 3 of this application stating that the defendant's "whereabouts" was unknown is not the equivalent of stating that his "residence" is unknown and is therefore not a statutory ground authorizing the clerk to issue and have published a citation against the defendant.[1] It was pleaded by the Petitioners that the

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1. Thus in Young vs. Young, 127 S. W. 898, it was said: "The service of a citation was by publication, on defendant in error's affidavit that he 'did not know the whereabouts' of his wife. It is objected that the affidavit was not sufficient to authorize service by publication, and, plaintiff in error not having appeared to defend the suit either in person or by attorney, that the court was without power to render a judgment against her. The contention is sustained * * *"

affidavit in question was insufficient and not a statutory ground authorizing the clerk to issue it and have it published, (R. 11-12). This defect in the proceedings in said County Court case against Jordan could not be disregarded by a court having the judgment therein under review to determine its validity. The trial court held the proceedings a nullity, (R. 30). Therefore the effect to be given to and the construction of the judgment in question based on such fundamental defects, jurisdictional so to speak, present a question of local law and the Honorable Circuit Court of Appeals has therefore decided a question of local law in conflict with applicable decisions of the Texas courts within the meaning of Subdivision B of paragraph 5 of Rule 38 of this Honorable Court.

2. The Honorable Circuit Court of Appeals in reversing the judgment below and in holding, as against a collateral attack, that the citation published against Jordan was authorized and constituted legal notice to him so that the court had jurisdiction to adjudicate against him, wholly disregarded the applicable Texas cases cited under the foregoing first reason and likewise disregarded the provisions of Article 2039, said cases holding that a citation issued by the clerk and published under the facts stated in the quoted affidavit,

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And in Stegall vs. Huff, 54 Texas 193, it was said: "In this case the record of the Justice Court affirmatively shows that the judgment by default against Huff was rendered upon a citation by publication, issued upon a ground not authorized by the statute, and was consequently void, and not voidable only."

does not constitute legal notice to the defendant so that the jurisdiction of the court to adjudicate against him does not attach. Petitioners alleged that the defendant Jordan was not legally served with any citation authorized by law and that the judgment against him was a nullity, (R. 11-12) and the court below sustained this contention, (R. 30). It was a question of local law and it is submitted that the Honorable Circuit Court of Appeals has thus decided a question of local law in conflict with applicable decisions of Texas courts within the meaning of Subdivision B of paragraph 5 of Rule 39 of this Honorable Court.

3. The Honorable Circuit Court of Appeals for the 5th Circuit in so deciding as set forth in the preceding paragraphs 1 and 2 of this petition, held directly contrary to the case of Johnson vs. Hunter, 147 Federal 133, 8th Circuit, opinion by Justice Van Deventer in which it was held that a similar affidavit for a citation by publication stating that the defendant was a non-resident (Johnson a resident of Ohio at the time) but not alleging that he did not reside in the county of the suit at the time thereof and that no one was in possession of the land at the time of the suit, was an insufficient affidavit for the clerk to issue the citation and have it published and also that such citation published did not constitute legal notice to the defendant, for which reason the judgment of the State court of Arkansas selling the defendant's lands to satisfy the judgment was a nullity.

4. The Honorable Circuit Court of Appeals in reversing the judgment below and in holding that the County Court of Scurry County, Texas, was authorized to sell Jordan's lands and that the sale thereof was valid as against a collateral attack, regardless of the defects in the proceedings against Jordan, wholly disregarded Articles 2050 and 2039 of the Texas Statute and the applicable Texas cases of Stewart vs. Anderson, 8 S. W. 295, and American Surety Company vs. S. L. & S. Co., 180 S. W. 101 (both Supreme Court decisions) and others, which directly held that it is essential and jurisdictional in a proceeding to sell attached lands of a defendant served with citation by publication, for the court to first acquire jurisdiction over the defendant in the mode prescribed by law and render a valid judgment against him before the sale is valid.[1] As aforesaid, it was especially pleaded by the Petitioners that the sale in question was void, (R. 11-12). It was contended by the Respondents in their brief in the Circuit Court that citation against Jordan was not a prerequisite for the court to have jurisdiction to sell his lands and divest title out of him. It was a question of local law that was before the trial court in this case. The judgment attacked was by Texas court and in-

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1. Thus in Stewart vs. Anderson, 8 S. W. 295, it was said: "It was necessary that an attachment should have been levied on property within this state, and that the notice required by law to be given by publication should have been given, before the court could acquire jurisdiction to enter a judgment against Humphries, directing property seized to be sold for the payment of the debt due to Harrell; Humphries being a non-resident, and not appearing. This we deem the settled law of the land."

volved lands situate in Texas. Therefore, we present that the Honorable Circuit Court of Appeals has decided a question of law in conflict with applicable decisions of the Texas courts within the meaning of Subdivision B of paragraph 5 of Rule 38 of this Honorable Court.

5. The divorce judgment of 1916: The Honorable Circuit Court of Appeals in reversing the judgment below for Petitioners, and in holding that the divorce judgment by the District Court of Scurry County, Texas, in 1916, had the effect to divest title out of Jordan of his interest in the 200 acres for the reason Article 4638, heretofore quoted on page 11 af this brief, prescribed a Rule of Decision rather than a limitation on the court's jurisdiction to divest title, wholly failed to apply the provisions of said Article and the applicable Texas cases of Tiemann vs. Tiemann, 34 Texas 522; Scott vs. Bank, 133 Texas 1 (123 S. W. 2nd 306); Aucott vs. Aucott, 63 S. W. (2) 755 and Reasoner vs. Reasoner, 59 S. W. (2) 887, and others, which directly hold that in a divorce suit between the husband and the wife that the jurisdiction of the court is limited to a partition or division of the property between them and incidentally to award the use of all or a part of the property in favor of one or the other, but not to divest title.[1] The wife alleged in the suit that the 200

1. Thus in Scott vs. Bank, 133 Texas 1 (123 S. W. 2nd 306) the Supreme Court said: "By the provisions of Article 4638, R. C. S. 1925, the court pronouncing the decree of divorce has jurisdiction, in the divorce action, to decree a division of the estate of the parties in such

acres was the community homestead of herself and husband and that the only other property they owned at the time was a vacant lot in Plains, Texas, but, by reason of his abandonment, title should be divested out of the husband and vested in her, (R. 185). The judgment entered is susceptible of the construction that it divested title and not merely the use of the land, (R. 148). The title to all of the land described in the petition was divested. Petitioners answered and pleaded the invalidity of the judgment as divesting title out of Jordan for want of jurisdiction of the court to do so, (R. 51). The court below held that the divorce judgment was a nullity insofar as it divested Jordan of title and said that the court in a proper case could divide the property or decreed the use of it to the wife, (R. 32). The effect to be given to the judgment in question and the construction thereof is a question of local law and we submit that the Honorable Circuit Court of Appeals has decided a question of local law in conflict with the applicable decisions of the Texas Courts

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a way as the court may deem just and right, having due regard for the rights of each party and their children, if any. This statute does not allow the divorce court to compel either party to the divorce action to divest himself or herself of the title to realty. As we construe it, Article 4638, supra, is mandatory in its provisions."

And in Reasoner vs. Reasoner, 59 S. W. (2) 887, it was said by the court: "Under a proper state of facts the court would have the power to decree the use of the homestead, or even a life estate therein, in appellee, or to order its partition, or its sale and a division of the proceeds. But it had not the power to divest appellant of his title in community realty, to wit, the homestead, in this case. 15 Tex. Jur. p. 584, Sec. 108; Speer's Law of Marital Rights, Sec. 555; Article 4638, R. S. 1925; Tiemann vs. Tiemann, 34 Texas 523; Long vs. Long, 29 Tex. Civ. App. 536, 69 S. W. 428".

within the meaning of Subdivision B of paragraph 5 of Rule 38 of this Honorable Court.

6. The 1928 judgment: The Honorable Circuit Court of Appeals in reversing the judgment below and holding that the judgment of the District Court of Yoakum County, Texas, of June 5, 1928, in favor of Ethel Hall vs. H. C. Jordan was valid as establishing in her a ten year limitation under Article 5510, as against the defendant Jordan, wholly disregarded the applicable Texas cases of Barker vs. Temple Lumber Co., 12 S. W. (2) 175; Baker vs. Fogle, 217 S. W. 141; Temple Lumber Co. vs. Pulliam, 285 S. W. 609; Bergera vs. Meyer, 234 S. W. 544, and others, which directly held that for title of more than 160 acres to be divested out of the owner and vested in the claimant by adverse possession for ten years, that such claimants memorandum of title must be duly registered in deed records of the County where the land is situate for more than 10 years.[1] It was specially pleaded by Jordan that no facts existed or could have existed in 1928, the time of the judgment, to establish title out of Jordan by the 10 year statute of limitation, (R. 52-5). The memorandum of title was the divorce judgment and it was recorded in the deed records of Yoakum County, Texas, in Volume 12, page 203, on March 5, 1920, (R. 148). The provisions of Article 5510, under

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1. The Texas courts construe "duly registered" to mean: "The deed evidencing the claim under which the defendant entered must be recorded (Porter v. Chronister, 58 T. 53; Medlin v. Wilkins, 60 T. 409) in the county where the land is situated (Adams v. Hayden, 60 T. 223; Jones v. Powers, 65 T. 207; Cook v. Dennis, 61 T. 246."

the facts stated, denied jurisdiction of a court to divest title on a statement of facts showing a legal inhibition preventing recovery upon the facts stated. The effect of the judgment and the construction thereof was a question of local law and it is submitted that the Honorable Circuit Court of Appeals decided a question of local law in conflict with the applicable decisions of the Texas Courts within the meaning of Subdivision B of paragraph 5 of Rule 38 of this Honorable Court.

7. The Honorable Circuit Court of Appeals in reversing the judgment below and holding that the judgment in question, under the facts stated, was valid as against a collateral attack, as set forth in the preceding paragraph, wholly disregarded applicable Texas decisions on questions of local law in this: The divorce judgment of 1916 to have effect could only be construed as giving the wife the use of the 200 acres as against Jordan, either for life or for a term. His title thereto could not be divested and the judgment could not be valid as divesting title. The continued use by the wife, by reason of such judgment, could not be, in law, adverse possession as against the owner Jordan. In the petition for a 10 year limitation title she affirmed her right to the use of the land by reason of the divorce judgment and did not repudiate it. She, therefore, had presented no cause of action for the court to exercise jurisdiction to adjudicate against Jordan. Perkins vs. Perkins, 166 S. W. 195; Hardin vs. Hardin,

21 S. W. 1108; Watkins vs. Watkins, 119 S. W. 145 and Hayworth vs. Williams, 116 S. W. 43, all hold that no cause of action under the facts alleged existed for the court to have jurisdiction to divest title out of Jordan by reason of the asserted 10 year Limitation Title.

8. The Honorable Circuit Court of Appeals in reversing the judgment below and in holding that the petition presented a subject matter and controversy for the courts jurisdiction, wholly disregarded applicable Texas decisions and questions of local law in this: The petition and purpose thereof was for the court to decree superior title in Ethel Hall as against Jordan, based on her alleged title acquired by the divorce judgment, and thus for the court to confirm the divorce judgment. It was especially pleaded by Petitioners that the court therein had no jurisdiction, for the reason that no such matter cognizable in law was presented to it, that the court could not have jurisdiction to confirm a void judgment. These applicable Texas cases so hold: Wilkinson vs. Owens, 72 S. W. (2) 330; Hudson vs. Nowell & Son, 88 S. W. (2) 778; Graham vs. E. T. Land & Imp. Co., 50 S. W. 579. Also see the case of Earl vs. McVeigh, 91 U. S. 503.

Counsel for all Respondents are: Frank Stubbeman, Midland, Texas, and Warren Scarborough, Fort Worth, Texas, both of whom have been duly served with copies of this petition and the record herein, as evidenced by their receipt and waiver of notice attached hereto.

WHEREFORE, for the reasons set forth herein, as well as in the supporting brief hereto annexed, Petitioners respectfully pray this Honorable Court to issue its Writ of Certiorari to the Honorable Circuit Court of Appeals for the 5th Circuit, commanding it to forthwith send up a full and complete transcript of the record; that all proceedings be certified to this court, and that this cause be reviewed and the manifest errors of the Circuit Court of Appeals be revised and corrected as provided by law; that upon hearing by this Honorable Court the judgment of the District Court in this cause be affirmed and that the Circuit Court of Appeals for the 5th Circuit be reversed and set aside, and Petitioner's title to the lands in question be confirmed and all clouds cast upon their title by the claim of the Respondents be removed, and that such further proceedings be had herein as may be provided by law and equity.

E. L. Klett

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Of Counsel for Petitioner.

THE STATE OF TEXAS :

COUNTY OF LUBBOCK :

W. W. Campbell, being duly sworn, says that he is of counsel for H. C. Jordan and Ross Walker, Petitioners in the foregoing petition for Certiorari; that he prepared the foregoing Petition for Writ of Certiorari and that the allegations therein are true and that there is just cause for same as he verily believes.

W. W. CAMPBELL,

SUBSCRIBED AND SWORN to before me this the 17 day of January, A. D. 1941.

EUGENIA E. LUNDELL,
Notary Public in and for
Lubbock County, Texas

[Seal]

In the

UNITED STATES SUPREME COURT

OCTOBER TERM 1940

No. .....

H. C. JORDAN & ROSS WALKER, *Petitioners*,

vs.

G. V. FISHER, ET AL, *Respondents*.

May It Please The Court:

We first take up in this supporting brief the questions relating to the 120 acres as set forth at pages 9-10 and 18-22 of the petition for the writ. These questions or propositions were urged in the Circuit Court of Appeals in the brief for Petitioner for said court to affirm the judgment of the court below.

I.

The Head judgment against Jordan, a non-resident, was void, it being procured upon a citation by publication issued upon an affidavit not authorized by law nor meeting the requirements of the Statutes of Texas.

STATEMENT

At the institution of Head's suit against Jordan in the County Court of Scurry County, Texas, on November 14, 1912, his attorney made the affidavit quoted at page 4 of the foregoing petition as the authority for the clerk to issue a citation and have it published against Jordan. Article 2039 of the Texas Statutes is quoted at page 5 of the foregoing petition and we shall not further quote it.

The citation published recited that Jordan's residence was unknown, (R. 223).

The judgment of the County Court (R. 70) adjudged a debt against Jordan of $337.85 and ordered sale of the attached lands of which the 120 acres was a part (R. 71-2). The lands were sold at sheriff's sale to R. H. Looney on November 4, 1913 (R. 79). Looney paid the judgment as the consideration for the deed (Id.) The citation issued and published against Jordan in the suit was based on the aforesaid affidavit of Head's attorney filed in the case on November 14, 1912, and no other citation was published than the one shown in the record, (R. 36). No other title was sought out of Petitioner Jordan by the Respondents except through purchase from Looney by mesne conveyances, (R. 30). No evidence of any other title out of Jordan was offered by Respondents, (R. 30).

(a) The affidavit of Head's attorney that Jordan's "whereabouts" was unknown was not the equivalent that his "residence" was not known or that he was a non-resident.

Young vs. Young, 127 S. W. 898;

Stegal vs. Huff, 54 Texas 193;

Stoneman vs. Bilby, 96 S. W. 50;

Dunn vs. Taylor, 94 S. W. 347;

Borden vs. City of Houston, 62 S. W. 426;

Parker vs. Scobee, 36 S. W. (2) 303.

In Young vs. Young, Supra, the court said:

> "The service of a citation was by publication, on defendant in error's affidavit that he 'did not know the whereabouts' of his wife. It is objected that the affidavit was not sufficient to authorize service by publication, and, plaintiff in error not having appeared to defend the suit either in person or by attorney, that the court was without power to render a judgment against her. The contention is sustained."

In Stegal vs. Huff, Supra, the court said:

> "In this case the record of the Justice Court affirmatively shows that the judgment by default against Huff was rendered upon a citation by publication, issued upon a ground not authorized by the statute, and was consequently void, and not voidable only."

In Parker vs. Scobee, Supra, the court said:

> "Citation by publication was unknown to the common law. It derives its authority solely from the statutes. Since statutes authorizing citation by publication are in derogation of the common law, they are to be strictly construed, and only those persons who plainly come within the terms of the statutes may be served with process by publication".

In 50 C. J. 498, it is said:

> "Every step required to be taken by the statute is essential to the validity of the service and if any of the steps necessary to secure it are omitted, the court will not obtain jurisdiction over defendant to render judgment; and this is so, although defendant may have had actual notice. Furthermore, the method provided by statute for acquiring jurisdiction by constructive service must not only be strictly followed, but must be followed to the exclusion of any other method not also clearly provided".

25 Tex. Jur., Section 269, sums up the invalidity of the Head judgment, under the facts stated, in this language:

> "(Necessity for Process)—He must be served in one of the ways authorized by the statute. * * * In order to obtain jurisdiction over the defendant, and thereby authorizes the rendition of such a judgment against him, the statutory procedure for issuance and service of process must be strictly followed."

The case of Krumenacker vs. Audis, 38 N. D. 500 (165 N. W. 524) directly holds that an affidavit saying

that the "whereabouts" of a defendant is not known is not synonymous with residence.

Harding vs. Standard Oil Company, 182 Federal 421, holds that "residence" and "citizenship" are not synonymous.

(b) The recitations of due service in the Head judgment against Jordan and the recitations in the citation that his "residence" was unknown, did not confer jurisdiction on the County Court to adjudicate against Jordan and sell his lands to satisfy the judgment.

Stegall vs. Huff, 54 Texas 193;

Galpin vs. Page, 21 L. Ed. 959;

Bank vs. Chicago T. & T. Co., 49 L. Ed. 1051;

Johnson vs. Hunter, 147 Federal 133;

Stewart vs. Anderson, 8 S. W. 295.

"Judicial action without jurisdiction is a nullity".

Cleveland vs. Ward, 285 S. W. 1063.

"The very essence of jurisdiction is the power to adjudicate concerning the subject matter."

Where the record of a judgment shows that jurisdiction of the court to render it never attached, jurisdiction of the court cannot be presumed.

Milner vs. Gatlen, 261 S. W. 1003 (Supreme).

(c) The requirements of Article 2039 for service of citation by publication on the defendant that he

make a sworn statement that the defendant is a non-resident, or that his residence is unknown, etc., are jurisdictional requirements.

Stegall vs. Huff, 54 Texas 193;

Stoneman vs. Bilby, 96 S. W. 50;

Dunn vs. Taylor, 94 S. W. 347;

Johnson vs. Hunter, 147 Federal 133;

Galpin vs. Page, 21 L. Ed. 959.

II.

The attachment of Jordan's lands did not confer jurisdiction on the court to sell the lands; it was required for the plaintiff to also serve him in the mode prescribed by law with a valid citation issued on a statutory ground and obtain judgment against him before the jurisdiction of the court attached to sell the land.

Stewart vs. Anderson, 8 S. W. 295;

American Surety Company vs. S. L. S., 180 S. W. 101 Sup.

In each of the foregoing authorities our Supreme court held that the statutory requirements were jurisdictional and that a sale of the lands was a nullity if the statute was not complied with.

Article 2050 is as follows:

> "In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance by the defendant, as prescribed in this chapter, except where otherwise expressly provided by law."

In the case of Earl vs. McVeigh, 23 L. Ed. 398 and Johnson vs. Hunter, 147 Fed. 133, it is said:

> "As the object of exacting an affidavit as a prerequisite to notice by publication is to insure actual service of a summons in all cases where that is necessary and to avoid the rendition of decrees and the creation of titles which are void, we think it is plain the statute contemplates that the affidavit shall set forth all, and not part, of what is essential to a lawful service by publication."

We, therefore, think that the Honorable Circuit Court of Appeals has held contrary, not only to Texas decisions, but also contrary to the decision of the Circuit Court of Appeals for the 8th Circuit in the case of Johnson vs. Hunter, 147 Federal 133.

We next discuss the questions presented respecting the 200 acres. Such questions and propositions appear at pages 16 and 22-26 of the foregoing petition.

I.

(1916 divorce judgment void if title divested)

The court had no jurisdiction to divest title out of Jordan in favor of his wife as to the 200 acres in ques-

tion in Cause No. 1921, its jurisdiction specially denied by statute, it appearing from the record and judgment in said cause that it was a divorce suit, that the 200 acres was community property of the parties and their homestead, that Jordan was cited to appear and answer the suit by publication and that he did not appear and answer therein nor in any wise consent to the suit and judgment.

STATEMENT

The Scurry County District Court in the 1916 divorce judgment divested title out of Jordan and vested it in his wife to the 200 acres, (R. 148-50). The judgment also divested title out of Jordan in the vacant town lot in Plains, Texas, (Id.). In the petition for the divorce and for title to the property it was alleged that the 200 acres and the town lot was the only real estate of the parties, "plaintiff and defendant were possessed" of such property, that is that they owned it, (R. 184). Title was prayed to be divested out of the husband because he had abandoned his wife, (Id.).

Article 4638, quoted at page 11 of the annexed petition, protects the title to the property in each of the parties by providing that it shall not be divested. This statute has been the law in Texas for some fifty years. Our Supreme Court and Courts of Civil Appeals have construed the statute in a good many cases and without dissent the statute in question has been construed to be

a limitation on the jurisdiction of a court to divest title out of either of the parties; that the court can divide or partition the property between them as is deemed fair and equitable under the particular facts of the case, and in the division the fact that one of them gets property more valuable than the other is not a question of jurisdiction. This was the view of the trial court when this case was tried, (R. 32).

The article cited is a limitation on the jurisdiction of the court denying to it jurisdiction to divest title out of either of the parties to community property in a divorce suit and is not construed as a mere "Rule of Decision" and, for want of jurisdiction, a decree divesting title is a nullity.

Tiemann vs. Tiemann, 34 Texas 522;

Scott vs. Bank, 133 Texas 1 (123 S. W. 2nd 306);

Reasoner vs. Reasoner, 59 S. W. (2) 887;

Aucott vs. Aucott, 63 S. W. (2) 755.

The Tiemann vs. Tiemann case above cited is on all fours on the facts and the law with the Jordan case in the District Court of Scurry County, Texas. The decree divested the house and lot (homestead) in Seguin, Texas, out of the husband and vested it in the wife; also granted divorce and decreed custody of the child to her. The petition alleged that the lot and land was the homestead of the parties. In disposing of the case on appeal, our Supreme Court said:

"We are of the opinion that this decree cannot be supported by the law, in that it does operate to divest the title of defendant in the house and lot in question".

In reforming the judgment, the court mentioned the fact that the child was given to the custody of the wife so that she was the head of the family and therefore the court proceeded to give her the use of the land for life in this language:

"This virtually considers her the head of the family, and we think the court very properly decreed her the use of the homestead; but it was not in the power of the district court to give her more than a life estate in it, and it must therefore be amended so that the plaintiff shall take under it the sole use and right to occupy the said house and lot in the town of Seguin, for and during the term of her natural life, and the decree of the district court, being thus amended is affirmed."

In the Scott vs. Bank case, Supra, our present Supreme Court construed Article 4638 in this language:

"By the provisions of Article 4638, R. C. S. 1925, the court pronouncing the decree of divorce has jurisdiction, in the divorce action, to decree a division of the estate of the parties in such a way as the court may deem just and right, having due regard for the rights of each party and their children, if any. This statute does not allow the divorce court to compel either party to the divorce action to divest himself or herself of the title to realty. As we construe it, Article 4638, supra, is mandatory in its provisions."

Our Court of Civil Appeals in the Reasoner vs. Reasoner case, Supra, said:

> "Under a proper state of facts the court would have the power to decree the use of the homestead, or even a life estate therein, in appellee, or to order its partition, or its sale and a division of the proceeds. But it had not the power to divest appellant of his title in community realty, to-wit, the homestead, in this case. 15 Tex. Jur. p. 584 Para. 108; Spear's Law of Marital Rights, Para. 555; article 4638, R. S. 1925; Tiemann v. Tiemann, 34 Tex. 523; Long v. Long, 29 Tex. Civ. App. 536, 69 S. W. 428."

The construction and effect to be given Article 4638 is revealed in the foregoing decisions quoted. It is plain that the Article is a limitation on the jurisdiction of the court and does not prescribe a "Rule of Decision". It is the established law in Texas. It being a local law, the decision of the Honorable Circuit Court of Appeals in this case, in reversing the judgment below, is in conflict with and opposed to the decisions of all of the courts in Texas.

By analogy which have application we cite:

Grant vs. Ellis, 50 S. W. (2) 1093, by our present Supreme Court, wherein was presented the construction of the statute which provided that court costs in a tax suit was not taxable against the county. The tax collector had furnished at considerable expense the records as a basis for a lot of tax suits which were filed. Later the Commissioners' Court directed the suits to

be dismissed and the collections of the taxes authorized by an outside agency. The court in dismissing the suit adjudged the costs against the county. On appeal, our Supreme Court held:

> "According to the agreed statement of facts, the appellee had faithfully and efficiently performed the services required of him by the statute and earned the fee allowed by the statute; the defendants in the various tax suits were liable for the taxes claimed and these taxes were secured by valid liens upon the lands of the defendants for which foreclosure was asked in the suits. In this situation, when the county asked that its suits be dismissed, for the purpose of collecting all of the delinquent taxes due the state and county through agencies other than the courts, we do not think the statute should be construed as inhibiting the district court from adjudging, as it did in each of these cases, that the county should pay the fees due appellee. The principles of justice are just as binding upon governments as upon the citizens. The appellee had earned his fees and was entitled to a judgment against the defendants in the tax suits therefor with a foreclosure of the tax liens upon the lands of the defendants against which the taxes were assessed. The dismissal of the suits by the county deprived appellee of his right to collect his fees from the defendants in the various suits, and the county should not be permitted for purposes of its own, however, laudable, to deprive the appellee of this right without becoming liable for his fees.
>
> "We think the above holding is erroneous. The statute above quoted is clear and mandatory in its

terms. It absolutely prohibits any liability on the part of the state or county for the fees here involved. Certainly the commissioners' court has no power to set aside the plain terms of the statute either directly or indirectly."

Smith vs. Paschal, 1 S. W. (2) 1086, a judgment of a Probate Court ordered the administrator to close the estate and deliver the remainder of the assets to the County Clerk for distribution. The judgment was complied with. Later the heirs and devisees of the estate sued the Guardian and his bondsmen for the value of such estate delivered to the clerk. The applicable statute required the administrator to make distribution to the heirs or devisees and if they were not available to pay the funds to the State Treasurer for them. The judgment was collaterally attacked and in disposing of the case the court said:

"The most usual statement of what makes a judgment void (distinguished from voidable) is lack of jurisdiction over the parties, or some of them, or want of jurisdiction over the subject-matter. But, whether really included in the first-named condition or not, there is a third (or supplemental) state of like effect, and that is absence of authority to award the particular relief which the judgment undertakes to grant. Crow v. Van Ness (Tex. Civ. App.) 232 S. W. 539; Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; Freeman on Judgments, Sec. 116, 33 C. J. 1076. This, we think, has recognition in Houston v. Killough, supra, Clayton v. Hurt, 88 Tex. 598, 32 S. W. 877, Crawford vs. McDonald, 88 Tex. 626, 630, 33 S. W. 325; and it is not contra to anything said or held in the cases cited

> by the Court of Civil Appeals. The latter cases, and others like them which might be cited, had to do with mere irregular use of power and not (as here) with forbidden use of particular authority or use of authority in a method different from that specifically prescribed by the law of the court's creation and being. We have the case of a nullity which appears in the face of the judgment and its roll—noticeable 'by any court and at any time' (Higgins v. Bordages, 88 Tex. 458, 31 S. W. 52, 803, 53 Am. St. Rep. 770; Cotton v. Rhea, 106 Tex. 220, 223, 163 S. W. 2)—and not the case of something void for de hors matter or mere irregularity and, hence, within the protecting doctrine of 'collateral attack' ".

Harris vs. Barngrover, 72 S. W. (2) 971, was a collateral attack on a judgment of a Probate Court ordering lease of the ward's land for a period extending beyond his minority. The court was authorized to lease the land but the statute said that it should be leased only during the minority. The court held the judgment of the court ordering the lease of the land was void for want of jurisdiction, that is it was void insofar as it extended beyond the minority of the minor.

Again we see it is plain that our Texas courts do not treat the statute in question, or any analogous statute, as prescribing a "Rule of Decision" but, on the contrary, directly hold that it is a limitation on the jurisdiction of the court. We grant that there are cases in Texas where title was divested but in each and every such case it appeared, as found by the court rendering

the decision, that the defendant in the case appeared and answered and there was a contest between them, judgment rendered, and there was no appeal, or that he had consented to the judgment that was entered divesting him of title. This was true in the Askew case, 120 S. W. (2) 117, cited by the Circuit Court of Appeals. We discussed it in our original brief in said court on pages 51 and 52.

It is plain that the judgment in question is a nullity as beyond the jurisdiction of the court insofar as it divested title out of Jordan to the 200 acres. However, it is also clear that when such a judgment is under review on collateral attack, the reviewing court may treat the judgment as giving the use of the land to the wife for life, or for a term, and not the title, so that the defendant husband in such cases is still deemed, in law, the owner of his interest in the land. His title is not divested or forfeited by his abandonment of the wife and vice versa.

As further showing the holding of our Texas courts that similar statutes are treated as jurisdictional, we state the recent case of Commander vs. Bryan, 123 S. W. (2) 1008, wherein it was contended that the judgment recitals conferred jurisdiction on the court and also that the subject matter in controversy was one over which the court had general jurisdiction. We quote:

> "That announcement is applicable when the court, after acquiring jurisdiction, acts within the

powers delegated to it by the Constitution and statutes creating it. But if the court transcends those powers, its judgment is void and subject to collateral attack, even if it had general jurisdiction over the subject matter. Cline v. Niblo, 117 Tex. 474, 8 S. W. (2d) 633, 66 A. L. R. 916, and authorities therein cited. In that case, the court sustained a collateral attack on orders of the county court in administration proceedings, directing and approving a sale of homestead to satisfy general creditors of the estate, because of the Constitutional exemption of same to satisfy such debts. The probate records did not show that the county court had determined the issue as to whether or not the property was in fact the homestead of the plaintiffs, as surviving members of the family of the decedent. In the absence of such showing, it was held that such homestead character of the property could be established by proof de hors the record of the administration proceedings, and thus to show the lack of power in the probate court to order it sold for the purpose stated.

"Indeed, in Thompson v. Whitman, 18 Wall, 457, 21 L. Ed. 897, and National Exchange Bank of Tiffin v. Wiley, 195 U. S. 257, 25 S. Ct. 70, 49 L. Ed. 184, both cited with approval in Marin v. Augadahl, 247 U. S. 142, 38 S. Ct. 452, 62 L. Ed. 1038-1043, it was held that a judgment may be attacked collaterally as void for lack of jurisdiction of the subject matter or of the person of the defendant, even when the judgment recites findings of jurisdictional facts, such as service of summons upon the defendant. Which is in keeping with the guaranty of due process of law by both the Federal and State Constitutions (U. S. C. A. Const. Amend. 14; Vernon's Ann. St. Const. art. 1, para. 19);

and also in accord with the general rule that a void judgment is incapable of conferring any rights at any time."

II.

(The 1928 judgment)

Since Article 5510 required ten years adverse and peaceable possession "under some written memorandum of title duly registred" before such could be classed as a title, and since Ethel Hall's petition affirmatively alleged that her memorandum of title was recorded in March, 1920 (the judgment in No. 1821) and the record affirmatively showed that her said suit in No. 207 was filed on November 19, 1927, her said Second Count alleged facts showing affirmatively that she had no cause of action upon the facts stated.

STATEMENT

The divorced wife, Ethel Hall, on November 19, 1927, sued defendant Jordan in trespass to try title and also to establish a ten year limitation title out of him, alleging that his residence was unknown and asked that he be cited by publication. He was so cited and made no appearance or answer and thereafter judgment was rendered divesting title out of Jordan and vesting it in her on June 5, 1928 (R. 146-7; 192).

The Second Count of her petition will only be discussed for the reason the trial court held that the First

Count of the petition presented no subject matter for the court's consideration and the Circuit Court of Appeals in this case merely mentioned and referred to the decree so holding under Article 1977 of the statute, which required a plaintiff in such a suit to state the facts showing how he held title and that it was superior to the alleged title of the defendant. In fact it was conceded that the First Count of the petition presented no subject matter for the court's jurisdiction. The limitation count was based on allegations that her memorandum of title, to-wit the divorce judgment, was duly registered for the statutory time required and she referred to the record of it in the deed records of Yoakum County, Texas, for a more complete statement of her right to the possession of the land, (R. 191). Such record showed the judgment was recorded March 5, 1920, (R. 148).

As aforesaid, Respondents began this suit and alleged that title passed out of Jordan by reason of the suit and judgment, (R. 46-48). Petitioners answered and by cross-action alleged the invalidity of the judgment, as fully stated on pages 10 and 11 of the annexed petition.

No statement of the evidence supporting the judgment of the District Court of Yoakum County in said cause was filed, (R. 188).

The Second Count of the petition was as follows:

> "Plaintiff further represents that she has had peaceable and adverse possession of the above land

and premises continuously since September 19th, 1916, as against said defendant and as against the world, and that same is held under a written memorandum of title which fixes the boundary of her claim and has been duly registered in Book 12, on page 204, of the Deed Records of Yoakum County, Texas. That during all of said time she has been in exclusive possession of said property, cultivating, using, and enjoying same and has had same fenced and enclosed with a good and substantial fence and in a tract of acreage of less than 4000 acres, and she claims the title to said property under the ten year statute of limitation and under Article 5510 of the Revised 1925 Civil Statutes of Texas."

Article 5510 is copied in the footnote at page 15 of the annexed petition.

Under Article 5510 quoted, the Count of the petition presented no cause of action for the courts jurisdiction for the reason the memorandum of title referred to and adopted in the count showed on its face to have been recorded in the Deed Records of Yoakum County, Texas, on March 5, 1920. The Statute itself, as construed by the Texas courts, deny one claiming a limitation title as against the true owner when he has not had his memorandum of title recorded for ten years in the County where the land is situate coupled with peaceable and adverse possession.

Barker vs. Temple Lumber Co., 12 S. W. (2) 175;

Temple Lumber Co. vs. Pulliam, 285 S. W. 609;

Fergara vs. Meyers, 239 S. W. 544;

Baker vs. Fogle, 217 S. W. 141.

It is also held by Texas courts that a petition for a cause of action alleging a statement of facts showing "a legal inhibition preventing recovery upon the facts stated" presents no cause of action to a court for its jurisdiction, and, that a judgment entered on such a petition is a nullity not voidable.

McCamant vs. McCamant, 187 S. W. 1096;

Ritch vs. Jarvis, 64 S. W. (2) 831.

III.

Ethel Hall's Second Count of her petition in No. 207, alleging her title and right of possession by reason of the judgment in No. 1821 and not otherwise, and by reason thereof for the court to establish title in her out of Jordan as a ten year limitation title, and said judgment in No. 1821 being a nullity insofar as it purported to divest title out of Jordan, if it did, merely presents to the court a cause of action based on a void judgment and for the court to confirm such judgment in Cause 1821 as a valid judgment; for which the court had no jurisdiction.

Assuming that the divorce judgment, insofar as it divested title, was a nullity and that the only effect to

be given to the judgment would be to treat it as giving the wife the use of the land for life, or for a term, the petition for limitation of title merely presented a cause of action based on a memorandum of title, to-wit the divorce judgment, which was a nullity, and being such the record thereof could not serve as notice to Jordan, the owner, that the wife was claiming the title to his interest in the 200 acres.

Neal vs. Pickett, 280 S. W. 748.

A void judgment is not any legal notice to anyone, especially the owner of land, of which the judgment purports to divest title.

Furthermore such judgment being a nullity and the purport of the Second Count of the petition being for the District Court of Yoakum County, Texas, to confirm such divorce judgment as valid and as divesting title out of Jordan and vesting it in the wife, conferred no jurisdiction on the court for the reason the court has no jurisdiction over a cause of action to confirm a void judgment.

Wilkerson vs. Owens, 72 S. W. (2) 330;

Hudson vs. Nowell & Son, 8 S. W. (2) 778;

Graham vs. East Texas Land Imp. Co., 50 S. W. 579;

Earl vs. McVeigh, 91 U. S. 503.

IV.

Since Jordan and wife owned the 200 acres in community until their divorce in 1916 and thereafter as tenants in common with the wife in possession thereof, and since the title of each to their undivided one half interest was not adverse to the other, and since her claim of possession under the divorce judgment is not deemed in law an adverse possession, her Second Count in her petition in No. 207 to establish title in her to Jordan's one half interest by adverse possession of such interest for ten years, alleging that the land was community property until 1916 when the court divorced them and decreed her the use and possession of Jordan's interest, did not allege any fact to establish title in her to Jordan's interest to constitute adverse possession for ten years for a court to exercise jurisdiction and adjudicate.

A cause of action for a title to land based on allegations that the plaintiff has peaceable and adverse possession under Article 5510 and especially alleging the right of possession based on a void judgment and on facts that show she and the defendant owned it as cotenants with the use of all of it merely decreed to her for a term of years, presents a case that is the antithesis of adverse possession and is no cause of action for the court to adjudicate. It is uniformly held in Texas that there can be no adverse possession in law in favor of the life tenant against the remainderman, or one co-

tenant against another, without allegations that the co-tenant's title is repudiated and such notice made known to him more than ten years before the suit.

Perkins vs. Perkins, 166 S. W. 915;

Hardin vs. Hardin, 217 S. W. 1108;

Watkins vs. Watkins, 119 S. W. 145;

Hayworth vs. Williams, 116 S. W. 43.

The facts alleged in the Second Count of the petition in connection with the references made therein and adopted by Ethel Hall, established the fact that she and her ex-husband defendant owned the land in community until their divorce and thereafter as co-tenants and that her right to the use of Jordan's interest in the land was decreed her by the divorce judgment.

The fact that no statement of the evidence was filed in the suit in Yoakum County, Texas, of Ethel Hall against Petitioner Jordan in 1928 precludes the court from presuming that facts were alleged and proven to sustain the jurisdiction of the court.

Henry vs. Beauchamp, 39 S. W. (2) 642;

Article 2158.

It is noted that the court below in the trial of this suit between the parties hereto found that no evidence was offered of any use and possession of the 200 acres as against Petitioners from the date of the said judgment in 1928 to the date of the trial in 1939, nor was

there any evidence offered of possession of the 200 acres by the wife from the divorce judgment in 1916 to 1928 when she had the second default judgment against him, (R. 33-34).

V.

It is respectfully prayed that writ of certiorari be granted and that upon a hearing of this cause the judgments of the Circuit Court of Appeals reversing that of the District Court, be reversed and set aside and that the judgments entered, one for the 120 acres and the other for the 200 acres, by the District Court for Petitioners be affirmed, together with such other relief as Petitioners may be entitled to, either at law or in equity.

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W. W. Campbell, one of the counsel preparing the foregoing brief and petition, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same and that such petition and brief are not interposed for delay.

W. W. CAMPBELL.

In the

UNITED STATES SUPREME COURT

OCTOBER TERM, 1940

H. C. JORDAN AND ROSS WALKER, *Petitioners*

VERSUS

G. V. FISHER, FRANCES AMBROSE LAW AND HUSBAND, HAROLD WARD LAW, AND HONOLULU OIL CORPORATION, *Respondents*

AND

H. C. JORDAN AND ROSS WALKER, *Petitioners*

VERSUS

G. V. FISHER AND HONOLULU OIL CORPORATION, *Respondents*

RECEIPT AND WAIVER

Receipt of a copy of the Petition for Certiorari and supporting Brief and the Record is hereby acknowledged, and further, Notice of the filing and presentation of such Petition and Brief is waived and the Clerk of the Supreme Court of the United States may submit same within twenty days from the date of filing as provided by Paragraph 3, Rule 38 of the Supreme Court of the

United States. Respondents, however, reserve the right to file a brief in opposition within the time permitted by the rules of said Court.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

NO. 723

H. C. JORDAN and ROSS WALKER, *Petitioners*,

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VS.

G. V. FISHER and HONOLULU OIL CORPORATION, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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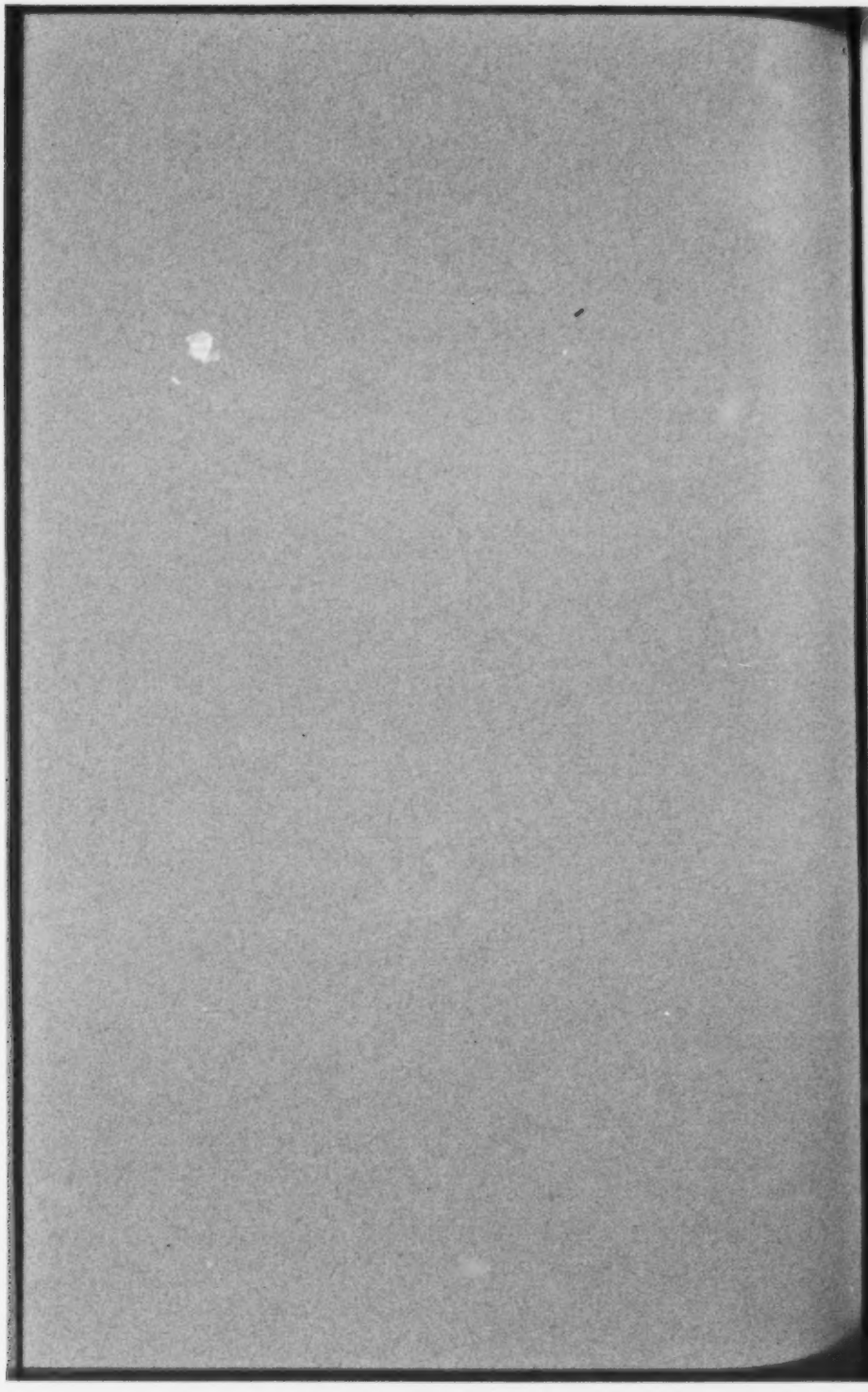

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IN THE

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OCTOBER TERM, 1940

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H. C. JORDAN and ROSS WALKER, *Petitioners*,

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Writ of certiorari to review the above causes should be denied, and in opposition to the petition for such writ, respondents, G. V. Fisher, Frances Ambrose Law, Harold Ward Law and Honolulu Oil Corporation, submit the following:

OPINIONS OF THE COURT BELOW

The opinion rendered by the 5th Circuit on December 18, 1940 is reported in 116 F. (2d) 183, and the opinion of the District Court, which was reversed by the Circuit Court, is reported in 32 Fed. Sup. 608.

SUPPLEMENTAL STATEMENT OF THE CASE

This record embraces two suits, one instituted by all of the Respondents as plaintiffs, and the other by Respondents, Fisher and Honolulu Oil Corporation only as plaintiffs, and both against Petitioners as defendants, as actions in trespass to try title and to remove cloud from title with respect to two separate tracts of land, one consisting of 120 acres and the other of 200 acres, both tracts being located in Yoakum County, Texas (Bill of Complaint in the first case R.3-9, and in the second case R.43-49). Although not consolidated, the cases were tried together and only one record on appeal was made (R.1,2). It was conceded that H. C. Jordan, one of the Petitioners, and his wife, Ethel Hall Jordan (subsequently divorced from him and not a party to either suit) acquired both tracts of land as community property from the State of Texas on August 19, 1908, at an agreed price to be later paid of $6.51 per acre (R.68-69). It was also conceded, and found and held by the trial court, that the former wife's one-half community interest in the two tracts of land had by regular chain of title passed to and become vested in the Respondents, so that the suits in reality involved only the husband's one-half interest therein.

The Petitioners by pleading (R.10) collaterally attacked, in the suit involving the 120 acres, a judgment of the County Court of Scurry County, Texas, referred to in the Circuit Court of Appeals' opinion as "The Attachment Judgment," which was rendered on July 10, 1913, in a suit styled W. E. Head versus H. C. Jordan and J. B. Jordan (the latter being the father of the Petitioner, H. C. Jordan). This judgment is found in the record 70-72. The 120 acres in question were duly, legally and in strict compliance with all statutory requirements attached, and pursuant to the aforementioned judgment, the attachment lien was foreclosed, the property sold and Jordan's title and interest in said land by regular chain of title passed to Respondents.

During the more than tweny-five years intervening between the sale and the filing for record of a quit claim deed from Petitioner, H. C. Jordan, to Petitioner, Ross Walker, on February 2, 1939, the record does not reflect that Respondents' title under such sale was ever questioned or clouded, and at about that time the testimony shows that Ross Walker wrote to Respondent, Fisher, for the purpose of attempting to buy a part of the mineral royalty under a part of the land in question, and in connection with such purchase borrowed and examined an abstract of title thereto (R. 260-262), and although Walker wrote back to Fisher on January 26, 1939, "* * * I had my attorney to examine the abstract and he finds the title in you is all right without objections" (R. 262), and actually purchased such royalty interest, nevertheless five days later Walker obtained a quit claim deed from the other

Petitioner, Jordan, for his alleged one-half interest in the 120 acres in question, and thus for the first time of record in more than twenty-five years there was even any apparent cloud cast upon the Respondents' title under the aforementioned judgment and sheriff's sale.

Petitioners also by pleading (R.50) collaterally attacked two other State Court judgments, one by the District Court of Scurry County, Texas, rendered on September 19, 1916, (referred to by the Circuit Court as "The Divorce Decree"), and the other rendered by the District Court of Yoakum County on June 5, 1928 (referred to by the Circuit Court as "The Judgment of 1928"), both of which judgments divested the Petitioners of title to the 200 acre tract and vested the same in the predecessors in title of the Respondents. Petitioners here, as in the courts below, wholly fail to differentiate between a collateral attack upon a prior judgment and a direct attack between the same parties and in the forum which rendered such prior judgment.

By supplemental pleading Respondents contended that they were bona fide purchasers for value without notice of any of the alleged defects in any of the three judgments, and that since said judgments were all regular upon their face and contained due recitations and findings which showed them to be valid, that they were entitled to recover, notwithstanding Petitioners' attacks upon such judgments. (R.16-56). Respondents also contended that the Petitioners had ratified and confirmed their respective titles, and in this connection particularly the claim of Respondent, Hono-

lulu Oil Corporation was based upon the fact that Petitioner Walker, had purchased and acquired a mineral royalty interest under the 200 acre tract by an instrument which expressly provided that said land was subject to an oil and gas lease in favor of Honolulu Oil Corporation and "* * * it is understood and agreed that this sale is made subject to the terms of said lease * * *" (R.255). Neither the question of bona fide purchaser for value nor of ratification were discussed or disposed of by the Circuit Court of Appeals, because of the fact that under its decision holding the judgments not subject to collateral attack the consideration of these questions was not necessary. However, Respondents here urge such propositions in support of the judgment of the Circuit Court in reversing the judgment of the District Court, which propositions will be hereinafter more fully discussed.

THERE ARE NO SPECIAL AND IMPORTANT REASONS AS CONTEMPLATED BY RULE 38 WHICH WOULD WARRANT A REVIEW BY THIS COURT ON WRIT OF CERTIORARI.

All three of the prior state judgments involved in these two collateral attacks are concededly valid upon their face. They were each rendered many years prior to the attack made upon them in these proceedings by state courts of Texas of competent and general jurisdiction. They each upon their face show that the court was rendering a judgment in connection with a controversy which was within the potential jurisdiction of the court. They each recite and find due issuance and service of process upon the Petitioner Jor-

dan, the defendant in each of said judgments. In each instance the Petitioners have sought to contradict and impeach the apparent validity of such judgments by resort to other parts of the respective records. Petitioners now seek to invoke the jurisdiction of this Court by petitioning for writ of certiorari principally upon the assertion of a conflict between the holding of the Circuit Court and the State Courts of Texas with respect to certain decisions. In subsequent parts of this brief we demonstrate as briefly and as concisely as possible that there is no conflict between the holding of the Circuit Court and the decisions of Texas with respect to each of the material points involved. While emphatically and as urgently as possible denying conflict, we call to the Court's attention that even the conflicts alleged are not conflicts with respect to important cases of local law, such as are contemplated by Rule 38.

In this case, as well as in any other cases relating to an attack upon a prior judgment, the decision must ultimately depend upon the facts and circumstances in each case. For instance, the scope of review in a collateral attack is much more limited than upon a direct attack. A different rule is applicable where the judgment contains recitations or findings with respect to jurisdictional facts from that which applies when the judgment is either silent or when the defect affirmatively appears upon the face of the judgment. Similarly, when the judgment is not in personem but undertakes to deal with a specific res and it appears that such res has been attached or otherwise duly seized by process of the court actually or constructively, any

irregularities with respect to prior steps taken in the proceeding are not subject to review when the attack is collateral. In veiw of these and other factors, a decision in a case of this character necessarily is limited to the particular and peculiar facts and circumstances involved.

Even a cursory examination of the Petitioners' application and the authorities cited will disclose an apparent disregard of these distinctions. They indiscriminately cite to this Court and claim conflicts with prior decisions involving direct attacks, whereas the attack here is collateral. They urge before this Court decisions of Texas dealing with collateral attacks upon judgments which upon their face affirmatively show the defects complained of; whereas in this case each of the judgments are valid upon their face and affirmatively show both potential and actual jurisdiction, and it is only by an attempted resort to other parts of the proceedings in such prior cases that the alleged defects can be presented.

Petitioners likewise claim conflicts with Texas decisions where the question involved was one of potential jurisdiction of the Court over the character of controversy presented, which obviously have no application here. Petitioners also present authorities from the State Courts of Texas which do not represent the present holding of the Texas Courts, and even urge as one ground of conflict a Circuit Court decision from the Eighth Circuit to which this Court granted writ of certiorari and which was subsequently reversed by this Court.

An examination of the cases cited by Petitioners will show that such cases involve situations falling into one of four classes: (1) Such as *Young v. Young*, supra, where the attack was by appeal, or similar cases where the attack was a direct attack; (2) cases where the judgment complained of contains no recitals of due and legal service of citation, in which instance, of course, the entire record can be looked to. Such a case is *Stegall v. Huff*, in which the judgment under attack was from a Justice Court which is not a court of record. The opinion does not quote the judgment and we are not advised of what recitations were contained in the judgment; however, the court points out that it *affirmatively* appeared that the judgment was rendered upon a citation not authorized by statute. The Supreme Court on numerous occasions has said that since *Treadway v. Eastburn*, 57 Tex. 209, which was decided after *Stegall v. Huff*, that it had been the uniform holding of the Courts of Texas that "as against a collateral attack the recitations of due service in a judgment proper is conclusive upon such matter and may not be contradicted by other facts whether appearing in the record or aliunde. Such recitations import absolute verity." (*Switzer v. Smith*, post, page 19); (3) cases dealing with the Justice Court judgments holding that evidence dehors the record is admissible, and this is true because the Justice Court in Texas is not a court of record. For instance, in *Stoneman v. Bilby*, 96 S.W. 50, it appeared "the judgment does not recite the filing of an affidavit or service upon the defendant." Likewise, in *Cain v. Hopkins*, 141 S.W. 834, the judgment was silent as to the jurisdictional question; (4) cases involving a collateral at-

tack upon the judgment of a court of limited jurisdiction, or cases where the court has no potential jurisdiction of the subject matter of the suit, such as *Cline v. Niblo*, 8 S.W. (2d) 633, in which the question of jurisdiction involved a homestead question. None of such cases has any application here because County Courts in Texas are constitutionally created courts and have general and exclusive jurisdiction in all civil cases when the matter in controversy exceeds $200 and does not exceed $500, *Texas Constitution, Article 5, Section 16; Williams v. Ball*, 52 Tex. 603; *Texas Jur., Vol. 11, page 721.* In *Parker v. Scobee*, 36 S.W. (2d) 303, another of the cases relied on by Petitioners, there was involved a direct appeal and not a collateral attack.

In the numerous authorities relied upon by Petitioners with respect to the Divorce Decree, none of them deal with a collateral attack upon a judgment such as we have here involved. Many of the cases, such as *Scott v. Bond* (cited by Petitioners as Scott v. Bank) involved merely a question of venue and this by direct appeal. It did not involve a prior divorce judgment, nor did it involve a situation as we have here where the court, in addition to granting the divorce, was called upon to make provision for minor children. As pointed out in the Texas case of *Scott v. Bank* (post, page 31) notwithstanding the provision of *Article 4638*, the Court had the power to award the wife "a lump sum in property for the maintenance of the child * * *".

None of the Texas cases cited by Petitioners with respect to the alleged defect in the affidavit upon which

they claim the citation was issued in the attachment suit involve a situation where the jurisdiction of the court was based also upon a valid attachment. In the case at bar it was conceded that the attachment was duly issued and levied and no attempt was made to impeach or contradict the express recitations and findings in the judgment with respect to such attachment. Consequently, as held by the Circuit Court, the rule of this Court as announced in *Cooper v. Reynolds* and *Stephenson v. Kirtley* is applicable and there is necessarily no conflict between such decision and any of the decisions cited by Petitoners.

None of the cases cited by Petitioners with respect to the 1928 Judgment are in conflict with the holding that even though the petition be subject to general demurrer, such fact is not a ground upon collateral attack for setting aside the judgment. The Petitioners seek to show that the petition was subject to general demurrer, but any conflict in that respect would be immaterial because under the law in Texas, even if it be subject to general demurrer, Petitioners could not avail themselves of that fact in this, a collateral attack.

At the risk of unduly prolonging this brief, we consider first the decisions of the Texas Courts relating to the issue actually decided in connection with the 120 acre tract, and then the decisions relating to the 200 acre tract, and in each instance the authorities cited and reviewed demonstrate that there is no conflict between the approved and recognized holding of the Texas Courts and that of the Circuit Court in the case at bar.

I. THE SUIT INVOLVING THE 120 ACRE TRACT AND THE COLLATERAL ATTACK ON THE ATTACHMENT JUDGMENT.

There is no Basis for Invoking Jurisdiction of the Supreme Court.

1. THE ONLY CIRCUIT COURT DECISION WITH WHICH CONFLICT IS CLAIMED IS ONE WHICH WAS REVERSED BY THIS COURT.

The only conflict alleged with any Federal Court decision is with respect to *Johnson v. Hunter*, 147 Fed. 133, by the 8th Circuit Court of Appeals. Upon writ of certiorari the Supreme Court reversed this case; *Hunter v. Johnson*, 209 U. S. 541, 52 L. Ed. 918. The reversal, as shown by memorandum opinion, was based upon *Ballard v. Hunter*, 204 U. S. 241, 51 L. Ed. 461.

Under the rule laid down in Ballard v. Hunter, Petitioner Jordan could not challenge the sufficiency of the affidavit upon which citation was issued, because he was in fact a nonresident of the State of Texas at the time such affidavit was construed as sufficient by the court rendering the judgment in question and because at the time a due and regular citation was **actually issued and published** according to the statutes. Mr. Justice McKenna in that case stated in part as follows:

> "Plaintiffs in error, it is true, allege that no 'sufficient affidavit of the plaintiff' was filed 'stating positively or sufficiently any one of the facts' required to be stated, and that the clerk did not make, on the complaint or otherwise, any

warning order to plaintiffs in error, or to either of them, to appear in the suit as required, or which obliged them to appear therein or bound them by the proceedings which were had therein. But there was no allegation that either of them was in the county or that there was an occupant upon their lands. *Not being defendants who were entitled to personal service, they cannot urge against the decree that they were not given personal service, or complain that the complaint was insufficient as an affidavit for service by publication, because it did not deny the existence of conditions which there is no pretense existed.*"

This holding supports the reasoning of Judge Sibley in the case at bar wherein he said:

> "It thus appears that the clerk thought and the judge decided that 'whereabouts' was the equivalent of 'residence.' Right or wrong, no substantial injury was done Jordan. He was in fact outside the State and not servable personally, and his residence there was unknown. The object of the published citation was to give him notice, and the citation as issued and published was exactly what the statute prescribed and what it would have been if the affidavit had used the correct word."

On the other hand, the holding in the case at bar is in accord with the rule of the 8th Circuit as announced in the case of *Bull v. Campbell*, 225 Fed. 923 (certiorari denied) in which a state court judgment of foreclosure was attacked in the federal court upon the ground, among others, that the affidavit upon which the citation of publication was had was defective. The court followed the holding of the majority in *Pennoyer v.*

Neff and held that a defect in the affidavit would not render the judgment absolutely void so that it could be attacked in a collateral proceeding. The court stated:

> "It may be conceded that, upon an appeal from a decree rendered upon such an affidavit, it would be declared insufficient to warrant an order of the court for substituted service, a question not before us, and therefore not determined; but it would not follow that a decree based upon such an affidavit and order would make the decree absolutely void, so that it could be attacked in a collateral proceeding. No authority has been called to our attention in the very elaborate brief of counsel for defendant, nor in the oral argument, to any decision of the Supreme Court of the territory of Dakota, or the state of North Dakota, where such a judgment or decree has been declared void when collaterally attacked, nor have we been able to find any such authority. The court which acted on the affidavit held it sufficient, and if it erred the error could only be corrected by appeal. The decree cannot be attacked collaterally. Applegate v. Mining Co., 117 U. S. 225, 6 Sup. Ct. 742, 29 L. Ed. 892; Pennoyer v. Neff, 95 U. S. 714, 721, 24 L. Ed. 565."

The decision in the case at bar also followed prior holdings of the 5th Circuit; *Seefeld v. Duffer*, 179 Fed. 214, certiorari denied 220 U. S. 616; *Stark v. Sims*, 230 Fed. 115. In *Stark v. Sims* the Fifth Circuit had before it another attempt, long years after a state court judgment was rendered, to collaterally attack it. The judgment recited: "*And it appearing to the satisfaction of the court that there has been regular*

service of process upon said defendant," the court held that such judgment was not subject to attack upon the ground that no valid service had been had upon the defendant, even though the only record in the state court of an attempt to obtain service was "*an ineffective attempt to get jurisdiction by publication.*" Judge Walker, writing the opinion for the court, stated:

> "The fact that the file in the case, as it was found more than half a century after the case was disposed of, shows that there was an ineffective attempt to get jurisdiction by publication, does not prove the absence of personal service of process upon the defendant. After the lapse of more than 50 years since the rendition of that judgment *almost any fact essential to support the regularity and validity of the judgment and of the title acquired thereunder is to be presumed,* certainly when the indulgence of such presumption involves no contradiction of the recitals of the judgment. Baeder v. Jennings (C.C.A.) 40 Fed. 199, 217; Duncan v. Williams, 89 Ala. 341, 350, 7 South. 416; Voorhees v. United States Bank, 10 Pet. 449, 9 L. Ed. 490; 16 Cyc. 1075; 2 Chamberlayne's Modern Law of Evidence, pp. 1199, 1200."

Because of the fact that the property in question had been legally seized under a validly issued writ of attachment concerning which there was no complaint, the decision follows the long recognized and well-established rule of this court as announced in *Cooper v. Reynolds,* 77 U. S. 308, 19 L. Ed. 931; *Pennoyer v. Neff,* 95 U. S. 714, 24 L. Ed. 565; *Stephenson v. Kirtley,* 269 U. S. 136, 70 L. Ed. 213.

In *Cooper v. Reynolds* it appeared that Cooper had

sued Reynolds in the state court of Tennessee in an action in trespass to try title and had a writ of attachment issued and levied upon the land in question. The case proceeded to judgment, the land was sold and Cooper went into possession thereof. Reynolds then brought an ejectment in the United States Circuit Court for the Eastern District of Tennessee. He collaterally attacked the judgment of the Tennessee court upon the ground that the affidavit upon which the attachment was issued was defective, and upon the ground that there was no publication of notice as required by the statutes of Tennessee.

The Supreme Court upheld the judgment of the Tennessee State Court and in doing so held (1) that it was not called upon to rule upon any errors, no matter how apparent, which had been made by the Tennessee Court "unless they be such as prove that the court had no jurisdiction of the case"; (2) where there is a writ of attachment and levy upon property within the state "it seems to us that the seizure of the property or that which in this case is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely in rem. Without this the court can proceed no further. With it the court can proceed to subject that property to the demand of the plaintiff"; (3) that the actual issuance and service of the writ of attachment and the seizure of the property is the controlling fact and any irregularities in the preliminary affidavit are not of such nature as would authorize the federal court to hold that the judgment was absolutely void as distinguished from voidable.

In the case at bar there was admittedly a valid affidavit and bond for the issuance of a writ of attachment. The statute authorized such writ. It was duly and legally levied, recorded and indexed.

In *Stephenson v. Kirtley*, 269 U. S. 163, 70 L. Ed. 213, the court reaffirmed the holding of *Cooper v. Reynolds*. The land involved was situated in West Virginia. Stephenson and the other plaintiffs claiming under him sought to set aside a judgment of the state court holding that the deeds from Stephenson to his co-plaintiffs were fraudulent. The state court assumed to exercise jurisdiction by virtue of an attachment and citation by publication. The deeds were set aside and the land sold in satisfaction of the claim against Stephenson and was bought in by Kirtley. The bill in the federal court alleged that Stephenson and the other plaintiffs had no knowldege of these proceedings until after the time for reviewing them in the state court had expired, and that such proceedings were void because the affidavit upon which the attachment was issued did not comply with the West Virginia statute and because the order directing publication of notice of citation was defective and not in compliance with the West Virginia statute. The Supreme Court affirmed a decree of the District Court dismissing the bill and upholding the state court's judgment. With reference to the attack upon the attachment proceedings the court was of the opinion that the affidavit for attachment was sufficient, but stated:

> *"Furthermore, where a writ of attachment has been issued and levied, the preliminary affidavit has served its purpose, and even though it be de-*

fective and an appellate court might find in it sufficient error to reverse the judgment, this does not deprive the court of the jurisdiction acquired by the levy of the writ. Cooper v. Reynolds, 10 Wall. 308, 319, 19 L. Ed. 931, 933; Ludlow v. Ramsey, 11 Wall. 581, 588, 20 L. Ed. 216, 218; Miller v. White, 46 W. Va. 67, 71, 76 Am. St. Rep. 791, 33 S.E. 332; McIntosh v. Augusta Oil Co., 47 W. Va. 832, 837, 35 S.E. 860."

The Court likewise followed the well recognized rule that a recitation in the judgment itself was conclusive.

2. NO CONFLICT WITH STATUTES OR DECISIONS OF TEXAS.

(1) Under the well recognized rule in Texas, the recitations and findings in the Attachment Judgment (R. 70) to the effect that Jordan had been duly and legally cited to appear in the case, import absolute verity and are conclusive upon collateral attack upon the issue of jurisdiction of the court over the attached property.

25 Tex. Jur., Section 329, 330, page 856, etc.;
Treadway v. Eastburn, 57 Tex. 209;
Martin v. Burns (Tex. Sup.) 16 S.W. 1072;
Chapman v. Kellogg (Com. of App.), 252 S.W. 151;
Empire Fuel & Gas Co. v. Albright (Com. of App.), 87 S.W. (2d) 1092;
Mariposa Mining Co. v. Waters, 279 S.W. 576;
Reynolds v. Volunteer State Life Ins. Co., 80 S.W. (2d) 1087 (writ of error refused);

Avant v. Broun, 91 S. W. (2d) 426 (writ of error dismissed);

Iams v. Root, 55 S.W. 411 (writ of error refused);

Galloway v. State Nat'l Bank of Fort Worth, 56 S.W. 236 (writ of error denied);

Loper v. Meshaw Lumber Co., 104 S.W. (2d) 597 (writ of error denied).

The rule is clearly stated in *Tex. Jur.*, Vol. 25, page 856, as follows:

"329. Recitals Generally.—It is the right and duty of a court entertaining a controversy to determine whether or not it has jurisdiction; and while a judgment will not necessarily be regarded as void merely because the court did not recite its finding on this issue, the presence or absence of such a recital may, as we have seen, be determinative of its validity on a collateral attack. A recital of this kind need not enumerate all of the matters found as a basis for the finding that the court had jurisdiction. On the contrary, a general statement of the main fact upon which determination was made will usually suffice. * * *"

"330. Conclusiveness of Proper Recitals.—*A clear and definite recital of jurisdictional findings imports absolute verity, and, according to the weight of authority, is conclusive of the issue of jurisdiction; and no evidence of any kind—not even the remainder of the record*—will be received in contradiction thereof, even though such evidence would demonstrate that jurisdiction was not in fact acquired. In other words, a judgment that contains recitals of this character is not void, but merely voidable, and is subject to attack only

by means of a direct proceeding instituted for that purpose. It is invulnerable to collateral attack, no matter how invalid it may be.

"The rule is based on public policy. Its main purpose is to protect solemn judgments from indefinite suspicion and unwarranted attack. While, as has been observed, consequences almost calamitous at times follow its application, our courts have expressed the conviction that such occasional hardship is preferable to permitting the destruction of confidence in their judgments, a result which would inevitably follow the adoption of any other rule."

In *Switzer v. Smith* (Com. of App.), 300 S.W. 31, in a case involving a collateral attack upon a judgment based upon improper service of citation and in which the judgment itself recited:

" 'On this 17th day of February, 1915, came the plaintiff by attorney and the defendant though duly cited failed to appear and answer in this behalf, but wholly made default;"

and with reference to which the court stated as follows:

"Since Treadway v. Eastburn, 57 Tex. 209, it has been the uniform holding of the courts in this state that, as against a collateral attack, the recitation of due service in the judgment proper is conclusive upon such matter, and may not be contradicted by other facts, whether appearing in the record or aliunde. Such recitation imports absolute verity. Martin v. Burns, 80 Tex. 676, 16 S.W. 1072; Gibbs v. Scales, 54 Tex. Civ. App. 96, 118 S.W. 188 (writ refused); Chapman v.

Kellogg (Tex. Com. App.), 252 S.W. 151; Borders v. Highsmith (Tex. Civ. App.), 252 S.W. 270; Mariposa Mining Co. v. Waters (Tex. Civ. App.), 279 S.W. 576; Gillette's Estate v. State (Tex. Civ. App.), 286, S.W. 261; Barton v. Montex Corp. (Tex. Civ. App.), 295 S.W. 950."

(2) Petitioners contend that there is a conflict between the opinion of the Circuit Court of Appeals and the holding of a Texas Court of Civil Appeals in *Young v. Young*, 127 S.W. 898. This contention is without merit because the case at bar involves a collateral attack, whereas the cited case involved a direct appeal in which the entire record was before the appellate court and in which, of course, the presumptions and the binding effect of recitations in the judgment itself which are applicable where the attack is collateral, did not obtain.

There was no proof that the affidavit relied on by Petitioners was in fact the affidavit upon which the citation was issued, nor was there any proof that no other affidavit was filed. The present county clerk of Scurry County testified that there might have been other papers filed in the case (R. 238, 239). The Petitioners did not produce the file docket or any other instrument or testimony to show that no other pleading or affidavit was filed in the case. Petitioner Jordan testified that prior to his desertion of his family and his departure from the State of Texas in October, 1912, he made an arrangement with his father, J. B. Jordan, to look after his affairs and his land (R. 246). It so happens that the father was made a party to the suit and was present in person upon the trial of the case and

employed attorneys to defend the same. It is not beyond the realm of reason to assume that the attorneys employed by the father would have and did assert any and every defense which was possible to the cause of action being asserted by Head and to the jurisdiction of the court over the property which had been levied upon and seized by the process of the court. This assumption is substantiated by the findings in the judgment, not only in the formal recitations but also the express finding "that all parties are duly and legally cited therein to appear and answer the plaintiff's petition" (R. 70).

Anyone familiar with the practice of the courts of Texas knows that the court papers are open to the inspection of any one at any time and that there is no requirement that such papers must remain in the custody of the clerk at all times; in fact, they are withdrawn from the court and the clerk's possession freely and without order of the court or without any record of such withdrawal being made. The Supreme Court took cognizance of a similar situation in the *Lessees of Robert Grignon, et al. v. John J. Astor, et al.*, 2 How. 319, 11 L. Ed. 282 at 291.

In the case of *Mendlovitz v. Samuels Shoe Co.*, 5 S. W. (2d) 559 at 560 the court says:

> "If solemn judgments, foreign or domestic, may be attacked, except upon abundant and satisfactory evidence, their force and validity would be very much weakened."

(3) There is no conflict with the case of *Stuart v. Anderson*, 8 S.W. 295. In that case the attack was

collateral but the question involved related to the effect of the filing by the plaintiff in the original suit of an amended petition setting up an entirely new cause of action after the attachment and citation by publication was issued on an original petition. Because of the entire change in the cause of action, the court held that the attachment was levied for the enforcement of the cause of action asserted in the original petition and "*no attachment was levied to secure and enforce the payment of the claims thus made a cause of action* (as asserted in the amended petition)." The holding of the court to the effect that a judgment rendered by default upon such amended petition was void, was based upon a statute then in force but which was not in force at the time the judgments here in question were rendered. The question did not involve, as does the case at bar, the question of the *mere irregularity* of an affidavit upon which the citation may have issued. In the case at bar there is no question but what a proper citation (as well as writ of attachment) was in fact issued and duly published.

(4) In *American Surety Co. v. S. L. & S. Co.*, 180 S.W. 101, there was involved a direct appeal in which the question was whether or not the defendant in an attachment suit had subjected himself personally to the jurisdiction of the court by giving a replevy bond to the sheriff who had attached the property in question. There had been no citation of any kind and no other appearance. The court held that the giving of this bond did not constitute an appearance in the case generally and that citation was required upon the defendant. Since the attack was direct, the holding in

this case is not in conflict with the holding in *Cooper v. Reynolds*, 77 U. S. 308, and *Stephenson v. Kirtley*, 269 U. S. 136. It appeared in each of the latter two cases that the laws of Tennessee and West Virginia, respectively, required citation by publication, even in instances where the court had seized the res by attachment or otherwise; but notwithstanding such state statutory requirements, the Supreme Court in such two cases held that upon *collateral attack defects or irregularities with respect to the issuance of such citation would not permit the holding that the prior judgment was void.*

II. THE SUIT INVOLVING THE 200 ACRE TRACT AND THE COLLATERAL ATTACK ON THE DIVORCE DECREE AND THE JUDGMENT OF 1928.

There Is No Basis For Invoking Jurisdiction of the Supreme Court.

1. THE COLLATERAL ATTACK ON THE JUDGMENT OF 1928.

We are taking up the 1928 Judgment first because it will avail Petitioners nothing unless they can successfully attack both this judgment as well as the Divorce Decree. The holding of the Circuit Court of Appeals with respect to the suit relating to the 200 acre tract is not only amply supported by and in accordance with the decisions of the courts of Texas, but also with the universally recognized rule to the effect that upon a collateral attack, where the judgment is perfectly regular upon its face as was this judgment

(R. 146), any defects in said judgment with respect to the sufficiency of the pleadings or the correctness of the court's adjudication of the facts in issue or of its interpretation of the principles of law applicable thereto, cannot be inquired into. A judgment rendered upon a petition, even though such petition be subject to general demurrer, is still not a void judgment because the court rendering a judgment necessarily adjudged in the first instance that the petition was sufficient, and its adjudication of such an issue, even though subject to reversal on appeal, is not subject to review in a collateral attack. This is particularly true in this case where potential jurisdiction of the subject matter is conceded and jurisdiction over the person of the defendant is not in question.

Weems v. Masterson, 80 Texas 45, 15 S.W. 590;

Sederholm v. City of Port Arthur, 3 S.W. (2d) 925 (C.C.A.), affirmed by the Commission of Appeals in 13 S.W. (2d) 685;

Gibbens v. Bourland, 145 S.W. 274;

Hart v. Hunter, 114 S.W. 882 (error refused);

Bearden v. Texas Co., 41 S.W. (2d) 447;

Schaeffer v. Williams, 208 S.W. 220 (error refused);

Gulf T. & W. Ry. Co. v. Lunn, 141 S.W. 538, affirmed by the Supreme Court in 106 Texas 511, 171 S.W. 1121;

Tanton v. State National Bank of El Paso, 43 S.W. (2d) 957, affirmed by the Supreme Court 79 S.W. 833;

Freeman on Judgments (5th Edition), sec. 365.

In *Weems v. Masterson*, supra, Judge Stayton of the Texas Supreme Court stated:

> "A proposition that a judgment of a district court could be attacked in a collateral proceeding because pleadings were defective, if the court had jurisdiction of the subject-matter and the parties, would not be advanced, and it would be readily conceded that, however erroneous such a judgment might be, it would be conclusive on the parties until set aside by some direct proceeding for that purpose; and we are of opinion that this would be true even if the pleadings were so defective as to be bad on general demurrer, as to present no issue of fact."

In *Tanton v. State National Bank of El Paso*, supra, there was involved a collateral attack upon a prior judgment, based upon a petition which was held to be subject to a general demurrer. Notwithstanding this fact the judgment was upheld.

In this respect the Court stated:

> "The facts alleged in the petition were insufficient to show a lien upon the land, and this feature of the petition was subject to general demurrer. But this does not subject the judgment to collateral impeachment unless the deficiency is one which affects the jurisdiction of the court and deprives it of jurisdiction. I. Freeman on Judgments (5th Ed.), Sec. 365; 1 Black on Judgments (1st Ed.), Sec. 269, 34 C. J. p. 554, Sec. 852 and p. 560, Sec. 860; Holmes v. Buckner, 67 Tex. 107, 2 S.W. 452; Moore v. Perry, 13 Tex. Civ. App. 204, 35 S.W. 838; Pearson v. Lloyd (Tex. Civ. App.), 214 S. W. 759; Hart v. Hunter, 52 Tex. Civ. App. 75, 114 S. W. 882.

"This matter is discussed at some length by Judge Freeman at Section 365, from which these excerpts are taken:

" 'For jurisdiction does not depend upon the sufficiency or fullness of the statement of the cause of action pleaded, nor is it of any importance collaterally whether the pleading does or does not state a cause of action, providing it sets forth a case within the court's powers. If a cause is pleaded belonging to a general class over which the court's authority extends, then jurisdiction attaches and the court has the power to determine whether the pleading is good or bad, and to decide upon its sufficiency as a statement of a cause of action. * * *

" 'It would be difficult to imagine a case in which a court having jurisdiction in other respects could not render a judgment free from collateral attack, because of defects in or insufficiency of the pleading. * * * A pleading which is adequate in bringing the subject matter before the court may be faulty in many respects, even in its averments of material elements of the cause, and yet sustain the judgment against impeachment.' "

Chief Justice Cureton of the Supreme Court of Texas on March 13, 1935, (79 S.W. (2d) 833) in affirming the aforementioned case, stated:

"Without discussing the matter further, it is sufficient, we think, to here state that we concur in the opinion of the Court of Civil Appeals in this case, and, accordingly, affirm the judgment of that court."

The title of Ethel Hall as asserted and adjudicated

in the 1928 suit in the District Court of Yoakum County, is valid, because the 1916 judgment whether void or valid, together with adverse possession under it, was constructive notice to Jordan of the adverse nature of her claim. The trial court's decision in the case at bar seems to have been based in part upon an erroneous conception of the rules applicable to the right of one co-tenant to acquire limitation title as against another.

Of course, the general rule is that since each co-tenant is entitled to possession, notice of adverse possession by one co-tenant must be brought home to the other co-tenant in some manner other than relying upon the presumption of notice from the very fact of possession. But such notice may be either actual or constructive. Applying this rule to the case at bar, our first proposition is that the state court having passed upon the subject it is conclusively presumed that its finding was based upon evidence, and even if the rule required actual notice, the presumption would still obtain that the evidence showed actual notice. There is no affirmative showing that actual notice of the adverse nature of the plaintiffs' claim was not timely brought home to Jordan.

In the second place, under the law of Texas actual notice of the adverse nature of Ethel Hall's possession of the property was not necessary, and the fact of the rendition and recordation of the 1916 judgment and the notoriety and publicity incident thereto through the publication on four different occasions of the citation setting out her claim to the property was a notorious and overt act, regardless of the validity of the

judgment as a judgment, which conclusively constituted constructive notice;

Honea v. Arledge, 120 S.W. 508 (W. Ref.);
Production Company v. Lee, 132 Tex. 254, 121 S.W. (2d) 973;
Moore v. Knight, 127 Tex. 610, 94 S.W. (2d) 1137;
Jones v. Siler, 129 Tex. 18, 100 S.W. (2d) 352;
The Lessee of Clymer v. Dawkins, 3 How. 674, 11 L. Ed. 778 at 785.

Therefore, the only way that the limitation title of Ethel Hall was dependent upon the prior 1916 judgment was, first, as a written memorandum showing her claim to extend to a tract of more than 160 acres, and, second, for the purpose of showing constructive notice to Jordan of the adverse nature of her subsequent possession, *and in both respects it is absolutely immaterial whether such judgment be void or valid.* It would and did serve either purpose to the full and complete measure of the law, even though void as a judgment, to the same extent as if it had been valid. Of course, if it be valid the 1928 judgment would merely be carrying "coals to Newcastle."

The finding that no statement of the evidence was filed in this case is not supported by the record, but in any event its absence would not render the judgment void. The present clerk of the court rendering the 1928 judgment testified that there might have been a statement of facts filed in the case in 1928 (R. 190). The Petitioners did not produce in court any file docket or other record purporting to list all of the pa-

pers filed in the case. There was no affirmative showing that no statement of the evidence was filed except the testimony of the clerk that some twelve years later he was not able to find the same among the papers in the case. Even if no statement of the evidence was filed, the failure to do so would not render the judgment void and subject to a collateral attack;

Tex. Jur. Vol. 25, p. 412;
McLane v. Kirby & Smith, 116 S.W. 118;
Hayward v. Hayward, 53 S.W. (2d) 108;
Abramson v. Sullivan, 103 S.W. (2d) 229.

2. THE COLLATERAL ATTACK UPON THE DIVORCE DECREE.

There has been for years and still is much confusion in decisions of the State of Texas as to the meaning, construction and effect of the provision of the last sentence of this statute when the question was presented to the appellate courts upon appeal for direct review, *but all the decisions of Texas without exception, so far as we have been able to find, are to the effect that a judgment rendered in a divorce case which does divest one of the parties of the title to real estate is not void.* We shall presently review the authorities where the question has been presented in a collateral attack, but before doing so we call the attention of the Court to a number of cases in which the question has been raised on appeal or on a direct attack. One of the earliest, if not the earliest case, in which the interpretation of this statute came before the Texas Supreme Court was in *Fitts v. Fitts*, 14 Tex. 443. There the Court held

that the limitation in the statute applied to a separate property and not to community property.

In *Simons v. Simons*, 23 Tex. 344, the Court said that the statute taken as a whole vested in the District Courts power to exercise within reasonable limits a discretion in making partition of property between the parties.

In *Trimble v. Trimble*, 15 Tex. 19, the Court said, in granting a divorce, "The court may make such division at least of the community property, in reference to the condition of the parties and the support and education of the children as may be equitable and just."

In a number of cases, such as *Tiemann v. Tiemann*, 34 Tex. 523; *Long v. Long*, 69 SW. 428; *Aucutt v. Aucutt*, 63 S.W. (2d) 755; *Reasonover v. Reasonover*, 59 S.W. (2d) 887, and others, a judgment in which a divorce case was appealed, and the action of the lower court in divesting one of the spouses of title to real estate, whether separate or community, was reversed. However, the Texas appellate courts have recognized that the court can properly order the community property sold and thus divest title, and then divide the proceeds. This clearly *divests title;*

Smith v. Smith, 91 S.W. 815;
Ciulla v. Ciulla, 253 S.W. 643;
Young v. Young, 23 S.W. 83.

The Supreme Court of Texas in the case of *Hedtke v. Hedtke*, 248 S. W. 21, said at page 23:

> "The present statute is essentially the same as the act of 1841, with the elimination of the provi-

sion relative to slaves, and with the correction of manifest typographical errors. Its language ought to be given the meaning uniformly ascribed to it by this court, and that is, that the court pronouncing a decree of divorce is invested with wide discretion in disposing of any and all property of the parties, separate or community, and that its action, in the exercise of such discretion, should be corrected on appeal only where an abuse of discretion is shown in that the disposition made of some property is manifestly unjust and unfair. Simons v. Simons, 23 Tex. 348; Rice v. Rice, 21 Tex. 68; Gulley v. Gulley, 111 Tex. 238, 231 S.W. 97, 15 A.L.R. 564."

In the case of *Scannell v. Scannell*, 117 S.W. (2d) 538, at pages 543-544, the Fort Worth Court of Civil Appeals said:

"Our statutes confer upon the trial court a wide discretion in both matters of divorce and a division of the community property. Articles 4632 and 4638, R.C.S. * * *

"The discretion given to the trial court is not confined to the matter of grounds for divorce, but is extended to an equitable division of the property; the wisdom of this provision of law has seldom been criticised. The appellate courts may not revise that discretion in the absence of a clear abuse by the trial court. * * *"

Scott v. Fort Worth National Bank, 125 S.W. (2d) 356, by the Fort Worth Court of Civil Appeals, contains the following statement at page 364:

"Under the authorities cited, we hold that the district court had power and jurisdiction in 1929

> to enter judgment for divorce, award custody of the minor and, in the same proceeding, make such division of the property deemed by him to be just and fair between the parties and to their child. He could have at that time awarded to the non-offending wife a *lump sum in property for the maintenance of the child.* * * *"

In the case at bar it appeared from plaintiff's pleading in the 1916 case that the defendant had abandoned her, and had not since his abandonment contributed anything to the support of the three minor children. It was his duty as their father to support them even after the divorce, and even after the permanent custody of the children had been awarded to their mother. Unquestionably it was the court's duty to make provision for their care and support. Under such circumstances the aforementioned statute did not prevent the court from awarding this tract of land to the mother.

In any event plaintiff's petition asked for a recovery of this tract of land. It presented a controversy within the jurisdiction of the district court. It was that court's duty to pass upon and decide the issues. The defendant was properly before the court, and that court, whether right or wrong, decided the question and awarded the title to the wife. Under the authorities cited, that decision is binding in a collateral attack.

Texas Courts Hold Divorce Judgment "Divesting" Title Not Void.

Under the authority of *Erie Railway Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208, 84 L. Ed. 196, as well as under the statutory rule requiring federal courts to give full faith and credit and like effect to the judgments of the various state courts, the judgment of the District Court of Scurry County, whether rightfully interpreting and construing said statute or not, should not be held a void judgment because under the uniform decision of the courts of Texas identical judgments placing identical construction upon the statute have been upheld every time one of such judgments has been subjected to a collateral attack.

Askew v. Rountree, 120 S.W. (2d) 117 (W. dis.);

Bird v. Palmetto Lumber Company, 176 S.W. 610.

In *Bird v. Palmetto Lumber Co.*, supra, the Court upheld the prior divorce judgment when collaterally attacked and stated in part as follows:

> "The proper rule in such a case as the one under consideration is aptly stated by Mr. Freeman in his work on Judgments, Sec. 135, as follows:
>
> " 'Jurisdiction being obtained over the person and over the subject-matter, no error or irregularity in its exercise can make the judgment void. The authority to decide being shown, it cannot be divested by being improperly or incorrectly employed. Error of decision may be corrected, but

not so as to reach those who in good faith relied upon its correctness.'

"The court trying the cause of Bean v. Bean had jurisdiction over the parties and of the subject-matter of that suit. * *

"Such judgment is not void. * * *"

As pointed out by the Court in the Askew case above, every presumption necessary will be made in support of the court rendering the judgment being attacked.

In the case at bar this record shows that the husband, H. C. Jordan, deliberately abandoned his wife and children without making any provision for their support. At the time of the abandonment the family was living on this 200 acres. It is not unreasonable to assume that Jordan had agreed for the wife to have this property or even had made some character of conveyance to her of it. He was back in Texas for three or four years after the judgment was rendered, and made no complaint at that time about the judgment, although he knew of its rendition (R. 249). He testified that he was working in Arizona and California during the time between 1912 and the time of the judgment. He made no attempt to account for his earnings during that time, which, of course, were community property and half of which belonged to the wife.

The record shows that the wife sold this property to the plaintiff Fisher in 1931, and still the husband made no effort to attack the divorce judgment, but in 1937 did write his wife a letter, stating in fact that he had heard about the oil development, and that as soon as the time was ripe he was going to take some action

(R. 267). The record further shows that at the time of the abandonment there was considerable other property constituting a part of the community property, not only the 120 acres involved in the companion case hereto, but also the West half of Section 800. There may have been considerable other community property. The record is silent with respect thereto. It may be that the evidence before the District Court of Scurry County showed that Jordan had appropriated to his own use other parts of the community property. He may have taken off with him money or other effects constituting a part of the community, and if so, it was certainly within the court's power to adjust the matter by awarding the 200 acres to the wife. In any event the court having exercised its jurisdiction and decided the issue, it does not lie within the power of another court more than twenty years later to go behind the judgment and disregard it as a nullity.

III. RESPONDENTS WERE BONA FIDE PURCHASERS FOR VALUE AND ENTITLED TO PROTECTION AS SUCH UNDER THE LAW OF TEXAS, AND THIS RULE SHOULD BE APPLIED REGARDLESS OF THE HOLDING WITH RESPECT TO THE THREE PRIOR STATE COURT JUDGMENTS COLLATERALLY ATTACKED.

The rule is universally recognized in Texas that a bona fide purchaser for value of land at a judicial sale under a judgment valid on its face and containing recitations in the judgment itself showing jurisdiction will

be protected even in instances where the judgment is absolutely void for want of jurisdiction.

Carpenter v. Anderson, 77 S.W. 291 (writ of error denied);
Dean v. Dean, 165 S.W. 90;
Crow v. Van Ness, 232 S.W. 539;
Williams v. Young, 90 S. W. 940;
Yount v. Fagin, 244 S.W. 1036;
Snell v. Knowles, 87 S.W. (2d) 871.

The evidence amply and without contradiction shows that the Respondents, Fisher, Law and Honolulu, all acquired their titles for a valuable consideration and without notice of any of the alleged defects in any of the three judgments under attack. Although the burden was unquestionably upon Petitioners to allege and prove that the Respondents were not innocent purchases for value *(Cities Service Oil Company v. Dunlap*, 308 U. S. 208, 84 L. Ed. 196), not only did they fail to discharge such burden, but on the other hand the record affirmatively showed that Respondents, and each of them, were bona fide purchasers for value without notice.

J. J. Kelley testified without contradiction that he, as an employee and as land man for the Honolulu Oil Corporation, had purchased the lease upon the 120 acres in question in 1935, and after an examination of the records of Yoakum County, Texas, where the land was situated and without any knowledge whatsoever of any claim to such land by H. C. Jordan (R.278). The evidence also showed that the consideration of $1.00 per acre paid for such lease was a reasonable

price and the customary price being paid for such leases at the time (R.259-260).

The record shows that G. V. Fisher purchased the 120 acres from Mrs. Ethel Hall in 1927 (R.116), paying therefor $600, and assuming a debt due the State of Texas in the sum of $6.51 per acre, together with accrued interest. Fisher testified that the first information he had about any possible claim of H. C. Jordan was in 1937, more than ten years after he had purchased the land, when Mrs. Hall showed him a letter from her former husband, H. C. Jordan, saying "He was watching the situation in Yoakum County to the effect that when it was ripe that he expected to do something about it, securing what was rightfully due him" (R.267). That the amount paid by Fisher was entirely reasonable, is reflected by the testimony showing his grantor's efforts and inability to otherwise sell the land (R.274). No question was raised about the adequacy of such consideration.

The record showed that plaintiff Fisher purchased the 200 acres from Mrs. Ethel Hall by deed dated February 26, 1931, (R. 153) which was corrected by a subsequent deed of March 19, 1931 (R. 156). The record further showed that on July 27, 1926, Fisher had loaned to Mrs. Hall $500.00, and had taken as security for such loan a deed of trust upon the land in question (R. 207). At the time such deed of trust was taken Mrs. Hall had moved from this land to Abilene in Taylor County, Texas, and had established a homestead there in lieu of any homestead claim in this land, so that said lien was valid.

After the original loan Fisher had advanced other sums for interest on the state indebtedness against the land, taxes, etc. (R. 273). The land was conveyed to him by Mrs. Hall in cancellation of all of this indebtedness, which was secured by the aforementioned deed of trust. It not only secured the original $500.00 note but also subsequent advancements. (R. 208). Fisher's testimony to the effect that at the time he made such advances and at the time he took the deed from Mrs. Hall he had no notice whatsoever of the claims of her former husband, Jordan, was uncontradicted (R. 266, 271-273). Fisher, having a lien upon the property which he acquired in good faith and without notice, was entitled to protection as an innocent purchaser for value when he took title to the property in satisfaction of his lien and claim, to the same extent as if he had paid a new consideration at the time. The theory of "antecedent debt" does not apply under such circumstances. Furthermore, Fisher released the lien securing said indebtedness, which is now barred by limitation (R. 213). The authorities holding that an antecedent debt will not support a claim of innocent purchaser for value or based upon the fundamental concept that the purchaser, even though not protected, is thus left with his debt and his position has not changed. Where, however, a purchaser has surrendered security or has released an antecedent obligation and such obligation has become barred, the reason for the rule does not exist and the rule therefore does not apply.

66 Corpus Juris, page 1107, Section 931;
43 Texas Jurisprudence, page 636;
Tobin v. Benson, 152 S.W. 642;

Red River National Bank v. Latimer, 110 S.W. (2d) 232;
27 R. C. L., page 699;
Dunlap v. Green, 60 Fed. 242 (5th Circuit).

The question of innocent purchasers was not considered by the Circuit Court because of its holding with respect to the collateral attack on the judgments themselves, but under the holding of this Court in *Erie Railway Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Cities Service Oil Company v. Dunlap*, supra, the judgment of the trial court should have been reversed in favor of Respondents regardless of such holding. Respondents, therefore, urge this proposition in opposition to the granting of the writ of certiorari herein.

IV. PETITIONERS HAD RATIFIED THE LEASE TO HONOLULU AND ALSO THE TITLE OF FISHER WITH RESPECT TO THE 200 ACRE TRACT.

The record shows that by royalty deed dated January 28, 1939, filed for record on February 2, 1939, at 5:30 o'clock p. m., and recorded in Volume 53, page 301, Deed Records, Yoakum County, Texas, G. V. Fisher sold and conveyed to Ross Walker et al. an undivided one-tenth of the royalty in the 200 acres in question, such deed reciting as follows:

> "Said lands, or portions thereof, being now under oil and gas lease executed in favor of Honolulu Oil Corporation it is understood and agreed that this sale is made subject to the terms of said lease,

but covers and includes one-tenth of all the oil royalty, and gas royalty, and casinghead gas and gasoline royalty, and royalty from other minerals or products, due and to be paid under the terms of said leases."

Before said royalty deed was executed on January 28, 1939, Ross Walker on stationery of Lawrence L. Barber, one of the attorneys in the case at bar, wrote G. V. Fisher a letter dated January 26, 1939, enclosing said royalty deed for execution by the said G. V. Fisher, and stating that "I had my attorney to examine the abstract and he finds the title in you is all right without objections" (R. 262).

On the same day, hour and minute there was also filed for record a quit claim deed from H. C. Jordan to Ross Walker, dated February 1, 1939, reciting that it conveys "all of my undivided one-fourth interest in the aforementioned 200-acre tract of land" (R. 173). In this connection, it is important to note that Walker testified that he obtained this quit claim deed from Jordan in consideration of his agreement to finance a lawsuit to establish Jordan's claim to title (R. 301). Walker testified that Jordan came to him and made that proposition. However, it is significant to note that Walker began inquiring into the title in connection with his purchase of the royalty interest, and thereafter got this quit claim deed from Jordan.

The provisions contained in the royalty deed, the circumstances attending its execution, delivery and acceptance and the letter from Walker to Fisher constitute an acknowledgment and recognition of the title of Respondents. The deed itself expressly recognizes

Honolulu's lease and the letter expressly recognizes Fisher's title.

The courts of Texas go very far in favor of construing, if possible, the words of a royalty deed as constituting a binding ratification of an oil and gas lease therein referred to.

Turner v. Hunt, 116 S.W. (2d) 688 (Com. App.);
Grissom v. Anderson, 79 S.W. (2d) 619 (Tex. Sup. Ct.);
Humble Oil & Refining Company v. Clark, 87 S.W. (2d) 471 (Com. App.);
Van Deventer v. Gulf Production Company, 41 S.W. (2d) 1029 (writ refused);
T. P. Coal & Oil Company v. Kirtley, 288 S.W. 619 (error refused);
Mitchell v. Simms, 63 S.W. (2d) 371.

The law of Texas is well settled that one co-tenant may convey the entire property, which conveyance will be binding upon the other co-tenants if they ratify and adopt it. Such ratification and acquiescence may be evidenced by any acts indicating an intention to adopt the lease and recognize its validity as distinguished from intention to repudiate.

This contention was likewise not passed upon by the Circuit Court of Appeals, but is nevertheless urged by Respondents in opposition to the granting of the writ of certiorari.

In conclusion Respondents show to the Court that for more than twenty-five years after the Petitioner Jordan had abandoned his wife and family and left the State of Texas, the title to these two tracts of land has been regular and unquestioned and unclouded until the filing of the quit claim deed hereinabove mentioned as between the two Petitioners. Neither this nor any other court should sanction a collateral attack upon state court judgments regular upon their face and which, for such period of time, have not been directly questioned.

Petitioners assert to this Court that the holding of the Circuit Court of Appeals is in conflict with the decisions of the Texas courts. As a matter of fact, since this case was tried another suit has been instituted and tried in the state courts involving another tract of land and between one of the petitioners, H. C. Jordan, and the TP Coal & Oil Company. That suit is an unreported case, being No. 450 in the District Court of Yoakum County. It involved another tract of land which was also, along with the 120 acres here in question, involved in the Attachment Judgment. The Yoakum County District Court rendered a judgment upholding the Attachment Judgment and denying H. C. Jordan's collateral attack thereon. This decision of the Yoakum County District Court, occurring as it did after the trial of this case, is not contained in this record, and it may be that this Court cannot properly consider such judgment; but as an authority of a State District Court and as evidence of the fact that a decision in this case is not in conflict with the holding of the Texas courts, we called this matter to the Cir-

cuit Court's attention in the briefs there filed and our statement with respect thereto was not challenged. In any event the facts in this record are sufficient for us to assume that the Texas courts have and did reach a similar result as that reached by the Circuit Court.

Respondents respectfully pray that the petition for writ of certiorari herein be denied, and for such other relief as they may be entitled to.

Respectfully submitted,

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